

VOLUME II
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

**MARYLAND, FOR THE USE OF NADINE Y. LEVIN,
SYDNEY L. JOHNS, ET AL., PETITIONERS,**

vs.

UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 3, 1964
CERTIORARI GRANTED OCTOBER 19, 1964**

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Captain Julius R. McCoy

was recalled as a witness and having previously been duly sworn was examined and testified as follows:

Examination by Mr. Pettibone:

Mr. Pettibone: Will the Reporter mark this as United States Exhibit for identification No. 1.

(General Orders referred to marked U. S. Exhibit No. 1 for identification.)

Mr. Pettibone: Please hand United States Exhibit for identification No. 1 to the witness.

328 (Paper handed to witness.)

Q. (By Mr. Pettibone) Captain McCoy, will you look at United States Exhibit for identification No. 1.

Were you commissioned as a second lieutenant in the Maryland Air National Guard on 31 January 1952, with rank from January 25, 1952, pursuant to General Orders No. 9, issued by the State of Maryland Military Department, Fifth Regiment Armory, Baltimore, dated 31 January '52? **A.** This appears to be a General Order issued by the State of Maryland, appointing me as a second lieutenant in the Maryland Air National Guard, yes, sir, on the dates indicated.

Q. And that appointment was pursuant to General Order No. 9, an abstract part of which appears in United States Exhibit No. 1 for identification, is that correct? **A.** That is correct.

Q. Now, were you on March 31, 1952, by General Order No. 24, issued by the State of Maryland Military Department, Fifth Regiment Armory, Baltimore, Maryland, given Federal recognition as a second lieutenant in the Maryland

329 National Guard, with date of rank from 25 January 1952? **A.** Again, a portion of the exhibit appears to be a reproduction of a General Order appointing me as a second lieutenant, with Federal recognition in the Maryland Air National Guard.

Q. And does the extract from General Order No. 24, which is shown in United States Exhibit No. 1 for identification, appear to be an extract copy of the orders so extending Federal recognition?

Mr. Mudd: Excuse me, Mr. Pettibone, but I did not hear the first part of your question.

Would you read back the question, Mr. McDonald?

(Question read by the Reporter.)

Mr. Wolcott: Excuse me, Mr. Pettibone, am I to understand from your remarks that these are not complete copies of orders but merely extracts?

Mr. Pettibone: It is an extract of the part of the order which pertains to Second Lieutenant Julius R. McCoy.

Mr. Wolcott: Well, couldn't you, Mr. Pettibone, for my enlightenment, tell me just what has been left out of the Order?

Mr. Pettibone: Nothing that pertains to Captain
330 McCoy. Nothing that pertains to him. The orders that we have been speaking of list a number of individuals, but the other individuals, of course, are of no interest to us in this proceeding.

Mr. Wolcott: I see. Then, insofar as Captain McCoy is concerned, the order is complete.

Mr. Pettibone: That is correct. That is correct.

Mr. Wolcott: Thank you.

May I ask you this, Mr. Pettibone?

Should I find it necessary, would you have any objection to furnishing me with the complete order?

Mr. Pettibone: No, I would be happy to.

Mr. Wolcott: Thank you.

Mr. Pettibone: If you will give me a reasonable time to obtain it.

Mr. Wolcott: Certainly.

Mr. Pettibone: I think it is perhaps in the files of the State of Maryland and in the files of the United States Air Force, so unless we happen to have a full copy, I would have to request it from the State.

Mr. Wolcott: Yes.

331 Mr. Pettibone: I will be glad to get it for you.

Mr. Wolcott: Well, I suppose that applies to all orders that you refer to.

Mr. Pettibone: Yes, sir, that is true.

Mr. Wolcott: Thank you.

The Witness: The answer to your last question is it is correct.

Q. (By Mr. Pettibone) And were you by General Order No. 9, dated 31 January 1952, issued by order of the Governor, State of Maryland Military Department, Fifth Regiment Armory, Baltimore, Maryland, assigned to the 104th Fighter Squadron as a pilot? A. The extract named appears to be a reproduction of a General Order so appointing me.

Q. You are referring to the part of General Order No. 9 which appears in the United States Exhibit for identification No. 1, is that correct? A. That is correct.

Q. Were you subsequently promoted to the rank of First Lieutenant in the Maryland Air National Guard? A. That is correct.

332 Q. Do you remember the date when you were so promoted? A. I think it was in October 1952.

Q. Was that also pursuant to orders issued by the Governor of the State of Maryland, General Orders of the State of Maryland Military Department? A. I assume so.

Mr. Wolcott: We are going to object to that as to form. It calls for a conclusion, and the document speaks for itself.

Q. (By Mr. Pettibone) Now, were you subsequently after that promoted to the rank of Captain in the Maryland Air National Guard? A. That is correct.

Q. Do you remember the date when you were so promoted? A. 1 July 1956.

Q. By whose orders were you so appointed? A. United States Exhibit No. 1 contains an extract from a General Order No. 47, issued by the Military Department, State of

Maryland, that would indicate I was Federally recognized as a Captain on 1 July '56.

Mr. Wolcott: I move that the answer be stricken
333 as not responsive, as it referred to a document that the witness has not stated that he needed to refresh his recollection.

Q. (By Mr. Pettibone) After your promotion to the rank of Captain in the Maryland Air National Guard did you receive Federal recognition in that capacity? A. That is correct.

Q. Was that by General Order No. 7, dated 5 August '56, issued by the Military Department of the State of Maryland, Office of the Adjutant General, Fifth Regiment Armory, Baltimore, Maryland, an extract copy of which appears in United States Exhibit for identification No. 1.

Mr. Wolcott: Objection as to form, calling for a conclusion.

Mr. Mudd: What order was that?

Mr. Wolcott: And the document speaks for itself.

Mr. Pettibone: General Order 47, Roman Numeral III, the first one on this page.

Mr. Mudd: I thought you said 7.

Mr. Pettibone: 47.

The Witness: Again, U. S. Exhibit No. 1 contains
334 what appears to be a reproduction of a General Order granting me Federal recognition as of 1 July '56.

Q. (By Mr. Pettibone) Do you at the present time hold a commission as a Captain in the Air National Guard of the State of Maryland? A. That is correct.

Q. Did you hold such a commission as Captain in the Air National Guard of the State of Maryland at all times to May 20, 1958? A. That is correct.

Q. Do you hold any other commissions at the present time in the United States Air Force? A. I am not positive of the total procedure. This is very possible. I cannot be positive.

Q. Well, have you ever received any orders appointing

you as an officer in the United States Air Force as distinguished from the Air National Guard of the State of Maryland? A. To my knowledge, all of the orders that commissioned me in the Air National Guard include Federal recognition as part of the commission.

Q. Yes, but that is not my question. My question
335 was this: Have you ever received any orders appointing you as a commissioned officer in the United States Air Force as distinguished from the Air National Guard of the State of Maryland? A. I can say this, that all of the orders to my knowledge include the symbol AF, which to the best of my ability would be to represent Air Force.

Q. Have you ever received any order appointing you as a commissioned officer of any grade, issued by any Headquarters other than the State of Maryland Military Department? A. Not to my knowledge.

Mr. Mudd: May I raise a point of inquiry, Mr. Pettibone? And possibly Captain McCoy may not understand the import of your question.

Are you referring, for instance, to wartime duty, where I believe the witness earlier described this service during the war.

Mr. Pettibone: Well, I am glad you raised the point.

Q. (By Mr. Pettibone) I mean, Captain McCoy, to
336 confine the period of time involved in my question to let us say subsequent to January 25, 1952, at which time you were appointed a second lieutenant in the Maryland Air National Guard, as you have already stated, so that I am not referring to any time prior to that. A. I understand.

Q. As a matter of fact, then, prior to January 25, 1952 were you ever commissioned as an officer—let me change my wording there, so that you will understand my question better, perhaps.

Were any orders ever issued by any Headquarters other than the State of Maryland Military Department commis-

sioning you as an officer in the United States Air Force, or the Army Air Force, or the National Guard, either of the Army or the Air Force? A. I was commissioned in the Army Air Corps on 4 August 1944, and I believe in 1946 in the Army National Guard of West Virginia.

Q. And were you discharged from active duty under your Army commission in 1944 which you just referred to?

A. I was separated from active service in late 1945.

337 Q. Was that by General Orders issued by some military headquarters? A. That is correct.

Q. Do you happen to remember which headquarters issued those orders? A. I assume the Army Air Corps.

Q. And after that you were commissioned again in the National Guard of the State of West Virginia? A. I was commissioned in the Officers Reserve Corps subsequent to my separation from service, active service, Army Air Corps, in, I believe December 1945, and then later commissioned in the Army Guard, Army National Guard of West Virginia.

Q. That is the National Guard of the State of West Virginia you are referring to? A. That is correct.

Q. In the Air National Guard? A. Army.

Q. Yes. Referring to your Reserve commission which you mentioned, which you obtained in 1945, was that? A. I believe December '45, yes, sir.

338 Q. Were you discharged from that or released from it at any time subsequent thereto? A. I am not sure of the proceedings. I was commissioned without break in service to the West Virginia National Guard.

Q. Well, did you receive any orders at any time from any Headquarters relating to your status with respect to this Reserve commission which you just described? A. I would assume so.

Q. Do you have any recollection of what those orders provided? A. I do not.

Mr. Wolcott: Don't you have the records there, Mr. Pettibone?

Mr. Pettibone: No, Mr. Wolcott. These are State records, not Federal records.

Mr. Wolcott: I see.

Mr. Pettibone: And that is why I don't have it.

Mr. Wolcott: I thought you might have the Federal records on his reserve status.

Mr. Pettibone: We may have.

339 Mr. Wolcott: All right.

Mr. Pettibone: I don't know. I really did not mean to go into this service here.

Mr. Wolcott: That is all right. I thought if you had the records of that, that would help to clarify it.

Mr. Pettibone: Let us pause momentarily for a conference?

Mr. Wolcott: Surely.

Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, you testified previously, I believe, Captain McCopy, that you attended certain training schools, both prior to your appointment as a second lieutenant in the Maryland Air National Guard, and also subsequent thereto, is that correct? A. That is correct.

Q. And particularly you mentioned that you spent several months pursuing courses of training at Chanute Air Force Base in Illinois, is that correct? A. That is correct.

340 Mr. Mudd: Mr. Pettibone, may I make another point of inquiry regarding your Exhibit No. 1 for identification, sir.

Mr. Pettibone: Yes.

Mr. Mudd: On the bottom of the first page is the inscription, "SPECIAL HANDLING REQUIRED" IAW, paragraphs 49(a) and 52, AFR 62-14.

Mr. Pettibone: Well, that should have been crossed out, but inadvertently the photostat was made before it was crossed out.

May I request the Reporter to draw a line through that at the bottom of U. S. Exhibit No. 1?

Mr. Mudd: No, I would object to that, the point of my inquiry being, of course, that inasmuch as the apparent handling of this is in accordance with an Air Force regulation, that I would assume that any responsibility for the use of this in a public proceeding would be yours and not that of the witness.

Mr. Pettibone: That is correct. I will assume on behalf of the United States full responsibility for introducing this at this time. And no responsibility is chargeable to Captain McCoy on that account.

341 Mr. Mudd: I further note that the photostat indicates that this is a certified true copy, which was made by Captain Millard F. Hamblin, Jr., of the U. S. Air Force, who apparently at that time was Recorder of the Aircraft Accident Board.

Mr. Pettibone: Well, that is a capacity which gave him the legal power or authority under the applicable Air Force regulations to make certifications of this type.

It has nothing to do with his other duties as an Aircraft Accident Board Recorder. It just merely indicates the position he held, which under regulation gives him a certifying power.

Mr. Wolcott: Well, I join in the objection Mr. Mudd made for the record.

You have offered a certified copy, which I assume is a complete one. And if any explanations are to be offered, I understand you mean you have given them, but as far as making a physical mark on the exhibit, I would definitely object to it.

Mr. Pettibone: You mean you object to offering a certified copy?

342 Mr. Wolcott: No, I have no objection to it. I am talking about making any change in the exhibit.

Mr. Pettibone: Well, I do not propose to make any change in the exhibit in any way. No, I do not propose to

make any change in it. My remarks are merely directed to the words "SPECIAL HANDLING REQUIRED," and the other little notation right under it at the bottom of the page, but I do not propose to do more than comment on them. I do not mean to change it.

Mr. Wolcott: Well, I was going to make the suggestion, Mr. Pettibone, that if you wanted to make an explanation of that remark at the bottom, then your explanation would be made in the record, and I think that would clarify it.

Mr. Pettibone: All right.

Well, apparently the words "SPECIAL HANDLING REQUIRED" were put on there for some military reason, to comply with some Air Force regulation or military requirement, the nature of which is really unknown to me.

Mr. Wolcott: Yes.

Mr. Pettibone: I am sure it does not have any
343 relationship to our use of the document here for our purposes. Certainly there is nothing classified or confidential and that is not public information contained in the document. And so I am not just sure how it got there or why. I am sure it has nothing to do with our purposes here.

Mr. Wolcott: Well, we will assume that.

Mr. Pettibone: Yes.

Off the record, Mr. Reporter.

(Discussion off the record, after which testimony was read.)

Mr. Pettibone: All right, will the Reporter mark as United States Exhibit No. 2 for identification this document?

(Special Orders referred to marked U.S. Exhibit No. 2 for identification.)

Mr. Pettibone: Would you please hand U. S. Exhibit No. 2 to the witness?

(Paper handed to the witness.)

Q. (By Mr. Pettibone) Captain, will you examine U.S. Exhibit No. 2 for identification?

(Paper examined by witness.)

344 Q. Is United States Exhibit No. 2 for identification a copy of the orders which you received, which caused you to go to the Chanute Air Force Base, Illinois, to pursue a course of training and instruction which you described earlier in your testimony in this proceeding?

Mr. Mudd: If you remember.

Q. (By Mr. Pettibone) That is right, if you remember.

Mr. Mudd: I think you are testing the recollection of the witness.

Mr. Pettibone: Yes.

Q. (By Mr. Pettibone) I don't mean to call upon you to state more than you can remember, of course. A. U. S. Exhibit No. 2 appears to be a reproduction of Special Order No. 182, that authorized me to proceed to the Chanute Air Force Base for the reasons stated, yes.

Q. And did you pursuant to this Special Order No. 182, issued by the Military Department of the State of Maryland, proceed to Chanute Air Force Base, Illinois, on or about 18 September 1955?

Mr. Mudd: Objection. I object to the conclusion of counsel in the framing of the question.

345 Mr. Pettibone: What conclusion, may I ask, Mr. Mudd? I asked him if he proceeded pursuant to those orders.

Mr. Mudd: You said pursuant to the State of Maryland National Guard Bureau, and there are words there indicating it is by authority of the Secretary of the Air Force, in communication from the Chief of the National Guard Bureau.

Mr. Pettibone: That is true, but at the top of the exhibit it states, "Military Department, State of Maryland, Office of the Adjutant General, Fifth Regiment Armory, Baltimore, Special Order No. 182" and then follows the text of the order which says, "By order of the Governor, Milton A. Reckord, Major General, the Adjutant General."

That is why I refer to it as an order of the Air National Guard of the State of Maryland.

Mr. Mudd: Well, I think it is obvious then, from the reading of the document, and even the prior Exhibit No. 1 for identification, that these orders have been cut from orders received from other authorities and issued to Captain McCoy.

346 Mr. Pettibone: Oh, I agree. I think the document will speak for itself in that respect. But I still feel my characterization as I framed it in my question is proper.

Mr. Wolcott: Well, I join in the objection that Mr. Mudd just noted. I think it is improper for you to make your own characterization of an order that speaks for itself.

Mr. Pettibone: All right, I will withdraw the question in that manner in which I framed it before, and I will put it to the witness in the following manner:

Q. (By Mr. Pettibone) Captain McCoy, did you pursuant to the orders contained in United States Exhibit No. 2 proceed, on or about September 18, 1955, to Chanute Air Force Base, Illinois? A. I did.

Q. And while at Chanute Air Force Base, Illinois, pursuant to these orders, did you pursue a course of training to students in maintenance, known as or described as aircraft maintenance officers course? A. I did.

Q. And on the completion of that course where
347 did you go? A. I returned to Baltimore.

Q. Did you report to the Air National Guard of the State of Maryland upon your return? A. I did.

Q. Were you assigned to duty in the Air National Guard of the State of Maryland upon your return? A. That is correct.

Q. What duties were you assigned at that time? A. Aircraft maintenance officer.

Q. With what unit? A. With the 104th Fighter Squadron.

Mr. Pettibone: This is off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, after you were commissioned a second lieutenant in the Maryland Air National Guard in 1952, you stated previously that from time to time you attended training courses at training schools particularly a two weeks' period during the summer, is that correct? A. That is correct.

Q. Did you attend those training schools pursuant
348 to orders issued by some military headquarters? A. I am not familiar with the procedures necessary to direct me to this training.

Q. Well, isn't it true that when an officer such as yourself attends a training school normally written orders are cut by some Headquarters directing you to proceed to the school and take the course? A. That is the normal procedure, yes.

Q. And do you recollect whether or not such orders were cut covering your attendance at the training schools that you mentioned in your testimony? A. I assume they were, yes.

Q. Well, do you remember that they were cut? A. I don't truly remember that they were.

Q. Well, when you attended the training schools, isn't it the practice upon arrival to report to someone in pursuance to your orders? A. Are you referring now to the two weeks' summer training? Q. That is correct, yes. You testified that you went different places different sum-
349 mers to take training courses. A. That is correct.

Q. You recollect that? That is correct? A. That is correct.

Q. Now, when you went to those places which you have previously testified to, upon arrival at the training school or training center, did you report your arrival to anyone? A. I accompanied the entire 104th Fighter Squadron to those training sites.

Q. And do you have a recollection as to whether or not you presented any orders pertaining to you upon arrival

at any one of those training schools or centers? A. Not to my recollection.

Q. Well, do you recollect whether or not any orders on your behalf, covering perhaps the whole group of which you were a member, were so presented to anyone? A. I have no knowledge of it.

Q. Do you remember ever seeing any such orders? A. I have no recollection of seeing them.

Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, Captain McCoy, you
350 have also testified that during your period of service as a commissioned officer in the Air National Guard of the State of Maryland, that there were certain training requirements which you had to comply with, and also that there were various training schedules from time to time which you outlined the training that you and other commissioned officers in the unit would comply with. Do you recollect by whose authority those training schedules were issued to you and other members of your unit, or what Headquarters prepared and issued them, or by whose authority they were signed or made official? A. Is this the physical schedules of the training assemblies or the training required to be accomplished?

Q. Well, I have in mind both really, but separate the two items in your answer if you wish. A. To the best of my belief, the local Commander established the dates of the training assemblies.

Q. By the local Commander, do you mean the local Commander of your specific unit? In this case that would be Colonel Kilkowski? A. I believe at this time Major Scott.

351 Q. At this time Major Scott, but formerly Colonel Kilkowski? A. Formerly Colonel Kilkowski.

Q. And were those training schedules prepared on a written form and published, or maybe put up on the bulletin

board, or something like that? A. They were prepared in advance of the training assemblies, yes.

Q. About how long a period would be covered usually by training schedules of this type? A. I believe they are published for a six months period.

Q. Would the training schedule call for meetings or assemblies of members, of the commissioned officers, members of the unit? A. They would require the entire membership of the unit, both enlisted and commissioned, to perform their particular functions.

Q. About how often would the meetings take place? A. Roughly twice a month.

Q. Did you ever see any training schedules of this
352 type that were issued by anyone other than your unit commander? A. Not to my knowledge.

Q. Now, you testified previously that there was, in addition to the other National Guard Officers assigned to your unit, there was also a liaison officer, I think was the term used, usually an officer of the United States Air Force, is that correct? A. I believe his job description in this particular location is Air Advisor.

Q. I see. You had one commissioned officer then who was a commissioned officer in the United States Air Force, who was attached to your unit as an Air Advisor, filling this position, is that correct? A. That is correct.

Q. At the time of your commission and assignment to this unit, to the 104th Fighter Squadron, in 1952 until May 20, 1958, can you remember the names of the various officers who held this position of Air Advisor? And give the date approximately of each one, when they were in the unit, and I realize that this calls upon your memory and you may not be exact, but I don't mean to be
353 exact, but just approximately as you can recollect.

A. In 1952?

Q. Yes. A. When I joined the unit, Lieutenant Colonel Van Ausdell—V-a-n A-u-s-d-e-l-l—and I believe in 1953

Lieutenant Colonel Dow—D-o-w—and I believe again in 1957 he was replaced by Major Britton—B-r-i-t-t-o-n.

Mr. Wolcott: What was his full name?

The Witness: Major Britton?

Mr. Wolcott: Yes.

The Witness: Milton D. Britton.

Q. (By Mr. Pettibone) Now, as a military officer yourself, you are familiar, I assume, with the expression commonly used in the Air Force and the Air National Guard and other military installations, called command authority, is that correct? A. I am, yes.

Q. Would any of these officers whom you have just named, who were attached to your unit as Air Advisor, in your opinion have command authority at any time over you as a commissioned officer in that unit?

354 Mr. Mudd: Just a minute. Objection. The question calls for a conclusion of law—

Mr. Pettibone: It calls for his opinion.

Mr. Mudd: —by the witness, or, as the question said, his opinion. I therefore object to it.

I do not instruct this witness not to answer, however.

Mr. Wolcott: Well, I want to join in the objection, and on the further ground that the witness has not stated what he understands the term command authority to be, and I think he should be first asked that in any event.

Mr. Pettibone: I think your point is well taken, Mr. Wolcott, very well taken.

Q. (By Mr. Pettibone) Captain McCoy, what is your understanding of the meaning of the term command responsibility in the military establishment?

Mr. Wolcott: Did you say authority or responsibility? Are you using the term command responsibility or command authority?

Mr. Pettibone: Command authority. Command authority. If I said responsibility, Mr. Reporter,
355 please correct my statement. It should be command authority.

Q. (By Mr. Pettibone) Could you tell us what that means, Captain McCoy? A. There are established command lines in my opinion that emanate from the president right on down, right through the lowest officer, in a chain or in an organization of a particular type.

Mr. Wolcott: You are talking about the President of the United States?

The Witness: That is correct, sir.

Mr. Wolcott: Yes.

Well, I still don't understand what is meant by it.

Mr. Mudd: Well, perhaps not what the witness has said what he understands by it.

Mr. Wolcott: Well, okay. It certainly left me in the dark.

Mr. Pettibone: I will be glad to furnish you with the Air Force publication, if there is one, I don't know that there is one.

Mr. Wolcott: Does that mean a chain of command, 356 may I ask?

Mr. Pettibone: Is this off the record now?

Mr. Wolcott: Yes.

(Discussion off the record.)

Q. (By Mr. Pettibone) Captain McCoy, did you ever individually receive any direct orders from any of the officers whom you have just mentioned, who filled the position of Air Advisor with your unit? A. None other than to respect the rank and the military position of a superior, to my knowledge.

Q. Now, you have testified previously in this proceeding that part of your duties with the 104th Fighter Squadron was to perform what you called check-outs on planes and instruments assigned to the unit.

What is embraced in the term check-out as you used it in that connection? A. The term I believe was flight check.

Q. All right. A. I might be corrected on that.

Q. All right. A. And the objective was to evaluate 357 ate the equipment for its fitness for flight or for its air readiness in the case of instruments or radio

equipment and to monitor the quality of maintenance performed at the installation.

Q. Did that sometimes involve your actually flying the equipment? A. It did.

Q. As pilot? A. That is correct.

Q. Now, when you performed such duties involving the flying of equipment for this purpose, was that done pursuant to someone's orders, some superior's orders? A. It is desirable that an aircraft maintenance officer be able to perform this duty, and I believe that can be found in the appropriate manuals.

Q. Yes, I realize that, but when you actually did perform the duty, was it performed pursuant to orders of anyone? A. In all cases flight orders were issued to perform these duties.

Q. Yes, and by whose authority, or in whose name
358 were the flight orders in those instances issued? A.

The authority to operate the aircraft was issued by the Department of Air Force.

Q. I am referring now to flight orders to make a specific flight for the purpose which you have just described. Were those orders issued by the Department of Air Force? A. I assume the overall authority to operate the aircraft—

Q. No, I am not referring to that, but—

Mr. Wolcott: Please let the witness answer. You are interrupting the witness.

Mr. Pettibone: All right. I did not wish to interrupt him.

Mr. Wolcott: Now, clear up his answer. Let him finish his answer.

Q. (By Mr. Pettibone) Go ahead, state your answer. A. And in that connection, authority specifically delegated to the local Commander, who in turn issued the specific order to perform a specific flight.

Q. All right, now, we are referring—

Mr. Wolcott: Would you read that answer back? It does not sound very complete.

359 (Answer read by Reporter.)

Q. (By Mr. Pettibone) Where the specific orders for the specific flight—

Mr. Mudd: I think we would all agree that there was some part of his statement or answer that was left out.

Mr. Wolcott: That is right, because he started to say by authority—

Mr. Mudd: It is my understanding that he said they originally came down from the Air Force and they went to the local Commander.

Mr. Wolcott: That is the part that was left out.

Mr. Mudd: I wonder if we could clarify that on the record, Mr. McDonald?

(Testimony read by the Reporter.)

Mr. Mudd: Do you wish to add anything? You said, "I assume the overall authority", and then there was an interruption by Mr. Pettibone, and if Mr. Pettibone has no objection to letting him give his full answer.

Mr. Pettibone: Yes, let us supply the missing part, and I think he will probably be able to supply that, and then take up the rest of that.

360 The Witness: With the interruptions that have been in there, I am losing words.

Can I just make the whole answer over again?

Mr. Mudd: Go ahead.

Mr. Pettibone: Go ahead.

Mr. Wolcott: Go ahead.

The Witness: I assume that the overall authority to operate the aircraft is issued by the Department of Air Force, and then authority is subsequently delegated to the local Commanders to issue orders for a specific flight.

Q. (By Mr. Pettibone) Were the specific orders for the specific flight that you have described issued in each in-

stance by the Commander of your local unit, that is, the 104th Fights Squadron? A. To the best of my ability.

Q. You mean to the best of your recollection? A. To the best of my belief. I don't recall it.

Q. Yes. Yes. That would in other words be the base detachment Commander of your unit, either Colonel Kilkowski or Major Britton, or Major Scott, excuse me. A. I believe this would be the Squadron Commander rather than the base detachment Commander.

Q. I see. And who would that be? Can you recollect the name of the Squadron Commander who issued those orders? A. Any particular year or flight?

Q. Oh, let us take the year 1958? A. Colonel Kilkowski was Squadron Commander at that time. I assume he would issue the orders.

Q. Were the other officers, the other Squadron officers who would issue such orders, also commissioned officers in the Air National Guard, assigned to your unit? A. Yes, sir.

Mr. Mudd: Objection, on the ground of materiality.

Go ahead and answer the question if you know.

A. I assume that they are in the Air National Guard, yes, sir.

Q. (By Mr. Pettibone) Now, in your previous testimony you have mentioned the fact that you were from time to time given check flights to test your flying proficiency.

In general, what is the nature of such a flight, and in general how is it conducted, just briefly? A. Certain individuals are assigned the duty annually to check the proficiency of the pilots of the unit and the standardization between the pilots with the unit, and they are given a flight check, the pilots are given a flight check by these individuals.

Q. Well, exactly what does that involve? Does that involve making a flight in a plane accompanied by the person giving the test? A. That is correct.

Q. Did you actually make such flights for such test purposes? A. I did.

Q. Since the time of your commissioning in 1952, about how many such flights did you make for test purposes?
A. I don't recall.

Q. Well, about how often do you make these flights? Is it once a year or more frequently or less frequently than that? A. I believe it is annually.

Q. Were the individuals who gave you these tests members of the unit to which you were assigned? A. Probably.

363 Q. That is to say, were they commissioned officers assigned to the same unit as yourself? A. To the best of my recollection, yes.

Q. Do you remember the names of any of them? A. I don't at this moment.

Q. Were you ever given a check, a test flight for such checking purposes, by anyone other than a member assigned to the same unit as yourself? A. In my original answer in this line of questions I referred to the standardization for proficiency flight check.

Q. Yes. A. To my knowledge, I can't recall any member other than a member assigned or attached to the 104th Fighter Squadron that performed such a check with me.

Q. Now, Captain McCoy, in addition to being commissioned officer, a flight officer, a pilot in the 104th Fighter Squadron, you were also a civilian employee of that unit, is that correct? A. I am not quite sure what status I was.

364 Q. Well, you testified before, if I remember correctly, you said you had a dual status: You were a commissioned officer in the Air National Guard, assigned to this unit, and we have just gone over the assignment, your assignment to this unit, and your service with it from 1952 to the present time. Now I am turning to something else. You were also in addition to being a commissioned officer, you were also a civilian employee for a particular purpose, which we will go into in a moment, in the unit, is that correct?

Mr. Mudd: Go ahead and answer it if you can.

A. I cannot answer this question truthfully. I am required to wear the uniform that I presently have on during my status as an Air Technician, and I cannot truthfully answer your question.

Q. (By Mr. Pettibone) Well, aren't you aware of the fact that you were and are a civilian employee of the 104th Fighter Squadron as well as being a commissioned officer in it? A. Again, I cannot be positive as to the status.

Mr. Pettibone: Will the Reporter mark this document as United States Exhibit No. 3 for identification?

(Special Orders referred to marked U. S. Exhibit 3 for identification.)

365 Mr. Pettibone: I would like to ask the witness to look at Exhibit No. 3 for identification.

(Paper handed to and examined by witness.)

Mr. Wolcott: May I ask you on the record, Mr. Pettibone, what PAC means?

Mr. Mudd: Similar to authority contained in—

Mr. Wolcott: What does ANGR mean?

Mr. Mudd: National Guard Regulations.

Mr. Pettibone: In case you have any question as to the extract, the part excluded does not pertain to the witness or having anything to do with this matter that we are dealing with here.

Mr. Wolcott: Yes.

Mr. Pettibone: But I will be glad to give you the whole order.

Mr. Wolcott: Well, I assume the same comment applies to all of these.

Mr. Pettibone: Yes, that is right.

Mr. Wolcott: May I ask you on the record, Mr. Pettibone, what assistant U. S. P. & F. O. means?

Mr. Pettibone: It is an abbreviation for United States Property & Fiscal Officer.

366 Mr. Wolcott: I see.

Mr. Pettibone: As I am informed by competent Air Force authority.

Mr. Mudd: And put that in capitals, Mr. McDonald. Let the record show he is referring to Major Prince.

Q. (By Mr. Pettibone) Captain McCoy, referring to United States Exhibit No. 3 for identification, have you seen this document before at any time? I don't mean this specific one. I mean the original of which this is a copy or another copy of it. A. I have.

Q. In the second line of United States Exhibit No. 3 you will see the term, "Air National Guard Civilian Personnel Program". Do you know what that means or what it refers to? A. I assume that it has reference to some portion of the Air National Guard Regulation 40-01.

Q. Do you know whether or not it provides a program or procedure for the employment of civilian personnel by the National Guard?

Mr. Mudd: Objected to.

367 Mr. Wolcott: All right, objected to.

Are you referring to the personal knowledge of the witness?

Mr. Pettibone: Yes, I am asking him whether he knows.

Mr. Kieffer: Just a minute. For the record I would like to have it stated, although formal objections are waived, I wish to concur in all objections previously made and subsequently made that I did not individually object to.

And that goes on behalf of Mr. Galiher and his clients, and Mr. Davidson and his clients.

Mr. Pettibone: Well, I am sorry, Mr. Kieffer, but I could not agree to let a statement of that kind pass without comment.

If you have an objection on form, in accordance with our procedure here, you will have to make your objection, the same as the rest of us have. I could not agree to any other procedure.

Mr. Kieffer: Well, I believe this is a general discovery deposition, and under the Rules, of course, no objections are waived at the trial.

368 Do you prefer from now on that I concur in all objections made with Mr. Wolcott?

Mr. Pettibone: At the beginning of this deposition of the witness, you were not present at that time, I believe, but it was agreed that any objection as to form would be made here and now during the taking of the deposition of the witness, and that was the basis upon which we agreed that we would conduct this deposition. At least that is my understanding of it. And there are other people here who can concur in that. So in accordance with that, so far as I am concerned, I cannot make any exception to what was to be the procedure, and objections as to form have to be made here and now.

Mr. Kieffer: At this time I wish to concur in the objection which is made.

Q. (By Mr. Pettibone) Will you answer the question?

Mr. Wolcott: What is the question?

(Question read by the Reporter.)

Mr. Wolcott: Are you objecting, Mr. Mudd?

Mr. Mudd: Well, I made the original objection.

Mr. Wolcott: Yes.

369 Mr. Mudd: Of course, obviously this is a long way from the best evidence, but if you are testing his knowledge of the regulation, I will let him answer. Of course, what he says or what he understands does not necessarily prove what the program provides.

Mr. Pettibone: Well, we all realize that a lot of the things that he testified to here thus far have not always been the best evidence on the point.

Mr. Mudd: No, but presumably on some of these technical regulations, it may not be correct. The point I am making is that to test this witness on the contents of various regulations is extending the record really without any authoritative source, you might say.

Mr. Pettibone: If I have been very technical, I would certainly have to agree with you, but I really only asked

him very broad general matters. Now, maybe I am in error, but I assume that matters in the general knowledge of a commissioned officer with his rank in the Air National Guard would be admissible.

I am trying very hard not to be very technical about the regulations, and naturally they will speak for 370 - themselves anyhow.

Mr. Mudd: That is right, that is right.

Mr. Pettibone: I am asking him in a general way if he is familiar with the general civilian employment program of the National Guard.

Q. (By Mr. Pettibone) Now, will you please answer the question? A. I know that Air National Guard Regulation 40-01 provides certain information and certain requirements for the Air Technician Program. As to the status of the individual, again I am not positive.

Q. Well, you testified previously that you took a course of instruction at the Chanute Air Force Base back in 1955 and 1956, a course of training for aircraft maintenance personnel.

Now, upon the completion of that course you stated that you returned to your unit here in the Baltimore area. Were you given any duties in connection with aircraft maintenance upon your return to your unit at that time? A. As I stated, I was assigned the duties of an aircraft maintenance officer.

371 Q. And how were you paid for those duties? A.

I was paid at the rate of pay commensurate with the rank of aircraft maintenance officer in the Maryland Air National Guard.

Q. What was your title? A. Aircraft maintenance officer.

Q. Now, I am referring to 1956. Well, what was the date when you first took over these duties as an officer in aircraft maintenance? It was in 1956, was it not? A. 1956, yes.

Q. Do you remember the exact date? A. I do not.

Q. The month? A. June, I believe.

Q. All right, in June of 1956. What was your title at

that time? A. I was aircraft maintenance officer of the 104th Fighter Squadron, Maryland Air National Guard.

Q. Did you have any other title? A. In the Air National Guard?

Q. In the 104th Fighter Squadron, your unit.

372 Mr. Mudd: You mean other than rank, I presume.

Mr. Pettibone: That is correct.

Mr. Mudd: Do you mind if he consults with me?

Mr. Pettibone: No, go ahead.

(Mr. Mudd and witness in conference.)

A. I was base maintenance supervisor for the 104th Fighter Squadron as an Air Technician.

Q. (By Mr. Pettibone) Is that a capacity other than your capacity as a commissioned officer in the Air National Guard at that time? A. I believe that the Regulation requires that the base maintenance supervisor be a commissioned officer in the Air National Guard. That is my belief.

Q. What Regulation? What are you referring to? A. ANGR 40-01.

Q. Yes, that is true, but let me go back to my question now, because my question was a little different than that.

Is that status or position different from and in addition to let me say being a commissioned officer in the Air National Guard? I understand that you have to be a
375 commissioned officer to hold this position, but what

I am getting at is, is this a different position? A. I think I have stated that, Mr. Pettibone.

Q. No, you have not, not yet. A. I was an aircraft maintenance officer in the Air National Guard and held the job title in addition as Base Maintenance Supervisor, and to perform these duties, or to have this job description, I had to be a commissioned officer in the Air National Guard. If they are separate, I don't know.

Q. Did you receive separate pay in each of these capacities? A. I did.

Q. From a different source? A. I think both pay checks were drawn on the Treasury of the United States.

Q. Were you paid at the same time or different times? A. Not necessarily at the same time.

Q. Referring to United States Exhibit No. 3 for identification, in the sixth line under the words "Base Maintenance Supervisor"—the word maintenance being
374 abbreviated as Maint, there appear the letters NGC-11. Do you see those? A. I do.

Q. Do you know what they stand for, or what they represent, or what they mean, or what they refer to? A. I believe that is a rating issued by the National Guard Bureau for Air Technician Manning purposes.

Q. And following those letters and numbers, you see further letters, S-2 and then eff, followed by a date, 16 December '57, also abbreviated. Do you know what that stands for, refers to our means, and if so, tell us. A. I believe that refers to the step, in this case Step 2, and the effective date that I attained that step.

Q. All right. Prior to May 13, 1958, then, you were a base maintenance supervisor in the 104th Fighter Squadron, as indicated herein, is that correct? A. That is correct.

Q. And then to the right of Base Maintenance Supervisor you see the term Aircraft Maintenance Chief, the word Aircraft being abbreviated, Acft. Is that another technician's position to which you were transferred on
May 13, 1959?

375 Mr. Wolcott: '58.

Mr. Pettibone: 1958, excuse me.

The Witness: 16 May '58.

Mr. Mudd: I think it says effective May 16th.

Mr. Pettibone: Yes, you are correct. The order appears to be dated May 30th, but the effective date is May 16, by its own terms.

The Witness: That is correct.

Q. (By Mr. Pettibone) Now, tell us just briefly the general nature of your duties as air technician during the pe-

rigid you were employed as base maintenance supervisor. A. I had overall supervision of vehicles, crash equipment, ground support equipment in the various shops and other support areas of aircraft maintenance and the responsibility for aircraft maintenance.

Q. All right. Then after your transfer to the position of aircraft maintenance chief on 16 May 1958, did you thereafter have different duties as air technician? A. I had fewer duties. I relinquished certain areas to another individual.

Q. Just describe briefly in a general way your
376 duties as air technical after you became aircraft maintenance chief? A. I was concerned with aircraft maintenance and limited support for it as opposed to the overall base maintenance supervision prior to that date.

Q. Did you enter upon and perform duties of that position commencing on May 16, 1958? A. I did.

Q. Does that position require you to be a commissioned officer in the Air National Guard? A. To the best of my belief the Regulation says commissioned officer, warrant officer or—I don't recall if it is civilian or master sergeant. Maybe both.

Q. Did the change of position on May 16, 1958, which you just described, involve an increase in pay or salary for you? A. I believe the salary was the same or slightly more.

Q. Who was your immediate supervisor in your capacity as aircraft maintenance chief? A. Major Jesse D. Mitchell.

Q. What was the nature or extent of his supervi-
377 sion of your work? A. He assumed the duties of base maintenance supervisor.

Q. Is that the position which you had held previous to that time? A. That is correct.

Q. You mean the person who assumed your old position became your supervisor in your new position? A. That is correct.

Would you repeat the question again, please?

Mr. Pettibone: May I ask the Reporter to read it to you?

(Testimony read by Reporter.)

A. Yes.

Q. (By Mr. Pettibone) Referring to the United States Exhibit 3, in the seventh line of the test of this order, underneath the term aircraft maintenance chief, I see the letters NCMS-9. Do you know what those letters and number mean or refer to? A. The letters to the best of my belief and the related number designate a rate in
378 the air technician's manning document.

Mr. Wolcott: In what document?

The Witness: In the air technician manning document.

Q. (By Mr. Pettibone) What does the S-3 mean following it? A. That would indicate the step in the rate.

Q. And the letters eff I take it mean effective date of your entering into this position? A. That is right.

Q. May 16, 1958, is that correct? A. That is correct.

Q. Were you notified by anyone on or before May 16, 1958 that you were going to be transferred from the position of base maintenance supervisor to that of aircraft maintenance chief? A. I was.

Q. By whom? A. I believe Colonel Kilkowski.

Q. Do you recollect who notified you before your appointment as base maintenance supervisor? Who
379 informed you that you would be appointed to that position? A. Major Scott.

Q. That would be back in 1956? A. 1955.

Q. Did you apply to Major Scott for that position, either verbally or in writing? A. Yes.

Q. Did he discuss your qualifications for the position with you? A. He did.

Q. Did you inquire as to the rate of pay for the position? A. Very possibly.

Q. Did you discuss with him the general nature of the work and the nature of your duties? A. Probably.

Q. Were you at the time you first entered upon the position as base maintenance supervisor already assigned to the 104th Fighter Squadron as a commission officer? A. I was.

Q. How long had you been so assigned to it, sir?
380 A. Since January of 1952.

Q. And when you were transferred to the position of aircraft maintenance chief, on the effective date of May 16, 1958, did you request this transfer? A. I requested the new position, yes.

Q. To whom did you make the request? A. Colonel Kilowski.

Q. Did you discuss with him what your duties would be in the position of aircraft maintenance chief? A. I did.

Q. Did you see any written description of your duties as aircraft maintenance chief? A. Very probably, yes, sir.

Q. Was that on the occasion when you discussed your transfer to this position with Colonel Kilowski? A. I don't recall the exact date.

Q. Approximately at that time, though? A. Approximately at that time, yes.

Q. Do you have a copy of that description of your duty as aircraft maintenance chief at the present time? A.

There is a copy on file at the 104th Fighter
381 Squadron.

Q. You have read it, have you? A. I have.

Q. Had you read it on or before May 20, 1958? A. I had.

Q. Let me rephrase my question.

Had you read it before May 20, 1958? A. I had.

Q. Was there a written description of your duties as base maintenance supervisor on file at the Headquarters of your Squadron before May 20, 1958, at your old job? A. There was a copy on file.

Mr. Wolcott: Will you identify the document, Mr. Pettibone, instead of getting a description of it?

Mr. Pettibone: I will do that.

Q. (By Mr. Pettibone) Had you read it? A. I had.
 Mr. Pettibone: Will the Reporter mark this, please, as United States Exhibit No. 4 for identification?

(Outline of duties of Aircraft Maintenance Chief referred to marked U. S. Exhibit No. 4 for identification.)

382. Mr. Wolcott: What is this up at the top there, Mr. Pettibone?

Mr. Pettibone: Is this off the record?

Mr. Wolcott: Yes.

(Discussion off the record.)

Q. (By Mr. Pettibone): Referring to United States Exhibit No. 4 for identification, do you know what this document is, Captain McCoy? A. I do.

Q. Can you tell us what it is, or what it is a copy of? A. It is a job description of aircraft maintenance chief, and it is an extract of the Air National Guard Manual, 40-01.

Mr. Wolcott: Well, isn't there an overall title, Civilian Personnel Manual?

Mr. Pettibone: You have it there.

Mr. Wolcott: I mean is this where this comes from, the Civilian Personnel Manual?

Mr. Pettibone: That is right.

Mr. Wolcott: All right.

383 Q. (By Mr. Pettibone) Is this document which we have identified as United States Exhibit No. 4 for identification the same as the description of your duties as aircraft maintenance chief on file with your unit that you just referred to in your testimony? A. This is the document I have reference to.

Q. This is a copy of the same document, is that what you mean? A. That is right.

Q. And does it describe the duties which you began performing on May 16, 1958? A. Let me state at this time that Major Mitchell had not returned from the aircraft maintenance school, and I was still acting as his subordi-

nate or second in command, performing those functions of the overall base maintenance supervision in addition to those listed in the manual.

Q. You mean you held two positions on May 16, 1950?

A. As Major Mitchell's second in command I was responsible for overseeing certain functions that he would normally oversee had he been present.

Q. All right. And when did he return to the unit?

384 A. In November of 1958.

Q. So that during that period of time from—was it May 16th until November of '58, in his absence you had been looking after his duties as well as your own, is that what you mean? A. I had the responsibility for certain areas for this aircraft maintenance care.

Q. And then after he returned in November of 1958, you performed only the duties described generally in United States Exhibit No. 4, those prescribed for aircraft maintenance chief? A. That is correct.

Q. Do you recollect whether you performed any specific duties other than those described in United States Exhibit No. 4 on May 20, 1958? A. Other than these?

Q. Other than these listed in Exhibit 4 for identification. A. As Air Technician?

Q. That is right. A. I have no knowledge of any
385 specific duties. It is there possibly.

Q. I am referring now, of course, to your duties as Air Technician. A. That is correct.

Q. And those duties specifically described in Exhibit 4, for aircraft maintenance chief, and I am referring specifically to May 20, 1958.

Perhaps you answered this already, and if so, forgive me, but maybe I am a little confused, and I would like to get it straight. What I mean, did you perform any duties other than those referred to on that day as far as you remember?

Mr. Wolcott: I object to that in form. It is too broad, and it calls for a conclusion on the part of the witness, and a conclusion of law.

Mr. Pettibone: Well, I will be glad to try to reform the question so that it will be admissible.

Specify the part which you object to.

Mr. Wolcott: Well, I have stated my objection.

Mr. Pettibone: Well, I am afraid I do not understand it then. Could you make it more specific?

386 Mr. Wolcott: I think my objection stands on the record, and I don't feel it is necessary to add to it.

Mr. Pettibone: Well, all right, let the Reporter please read to me from the record the statement of the objection made by Mr. Wolcott.

(Statement referred to then read by Reporter.)

Mr. Wolcott: I think you ought to be specific.

Mr. Pettibone: I will withdraw the question and rephrase it as follows.

Q. (By Mr. Pettibone) Referring to United States Exhibit No. 4 for identification, in your capacity as Air Technician did you perform any duties on May 20, 1958 in addition to or other than those listed therein?

Mr. Wolcott: Objection. Whatever he performed cannot be characterized. You can ask him what he did. Now you are asking him to characterize it.

Q. (By Mr. Pettibone) All right, subject to that change, instead of saying what duties did you perform, did you do anything then other than the activities listed in this exhibit?

Mr. Wolcott: I make the same objection, on the
387 same grounds.

Q. (By Mr. Pettibone) All right, answer it.

Mr. Buckmaster: He stated he performed other duties.

Mr. Wolcott: He stated that he performed other duties.

Mr. Buckmaster: As supervisor.

Mr. Wolcott: I am sorry, I did not hear it.

I would like the witness to answer it.

The Witness: My answer was very possibly I performed other duties.

Mr. Wolcott: That is correct.

The Witness: I don't recall specifically any duties.

Mr. Wolcott: That is what he said.

Q. (By Mr. Pettibone) Prior to May 16, 1958, while you were base maintenance supervisor, who was your immediate superior, to whom you were responsible for the performance of your duties? A. Colonel Kilkowski.

388 Q. And on and after May 16, 1958, when you became aircraft maintenance chief, who initially was your superior, to whom you were responsible for the performance of your duties? A. Major Mitchell held the job as base maintenance supervisor. However, in his absence Colonel Kilkowski was my immediate supervisor.

Q. That would be from the period of May 16th to November of 1958? A. That is correct.

Q. And then is it correct that in November, when Major Mitchell returned to the unit, he became your immediate supervisor? A. That is correct.

Q. How many hours were you required to work per week in your capacity as aircraft maintenance chief? A. I can best answer that by saying that to the best of my belief a normal work week was a forty hour week.

Q. Did you actually work forty hours per week? A. To the best of my belief, yes.

Mr. Wolcott: Excuse me but—

389 Q. (By Mr. Pettibone) Were time records kept of how many hours you worked per week? A. I assume so.

Mr. Wolcott: Excuse me, but may I inquire—
Off the record.

(Discussion off the record.)

(Thereupon, at 12:30 o'clock p.m., a recess was taken until 1:30 o'clock p.m.)

AFTER RECESS

Q. (By Mr. Pettibone) Now, referring to your activity, first as base maintenance supervisor, and then subsequently as aircraft maintenance chief, you testified I believe just before the recess that you worked forty hours a week. What time did you normally start to work in the morning?

A. Well, the normal work week hours from 8:30—or, excuse me, 8 o'clock in the morning to 4:30 in the afternoon, Tuesday through Saturday.

Q. Did you check in with anyone when you reported for work in the morning normally? Did you have a time
390 clock? What system was there if any? A. We have a roll-call type of system rather than time clock, whereby your attendance is recorded on a roster.

Q. You mean someone who called the roll or read the roster every morning? A. This is true in the case of everyone except the officers.

Q. Well, I am referring to other than air technicians or other civilian employees of the unit. What system was maintained of keeping records of their working hours? A. That is an overall administrative function that I am not qualified to go into too deeply. However, the employees, with the exception of those people who wore an officer's uniform, were required to attend the roll call.

Q. Well, about how many people in those air technician jobs wore officers' uniforms in say May of 1958? A. Approximately seven.

Q. And about how many others were there who were not officers, who did not wear the officer's uniform? A. Approximately 120.

Q. Were you the only aircraft maintenance chief? A. That is correct.

391 Q. Were you the only base maintenance supervisor prior to May 16, 1958? A. That is correct.

Q. Approximately how many people would you supervise while you were base maintenance supervisor? A. Approximately 80 people.

Q. And about how many did you supervise after you became aircraft maintenance chief? A. Approximately 40. These are all approximations.

Q. I understand, yes. A. This is after I assumed the duties of aircraft maintenance chief, when Major Mitchell had joined our staff.

Q. If you were not present for duty or actually on duty in your capacity as aircraft maintenance chief, or before that as base maintenance supervisor, at any time between 8:30—and did you say 5 o'clock? A. 8 to 4:30.

Q. 8 to 4:30. Excuse me. A. Between 8 and 4:30.

Q. Between 8 and 4:30, on the work days Tuesday through Saturday inclusive, did you have to report
392 your absence to anyone? A. In the interest of good management, our absence was reported, yes, to a superior and to a subordinate.

Q. Well, suppose you were sick some morning—were you ever sick and for that reason did not go down to work in the morning? A. Yes.

Q. That has happened? A. That has happened.

Q. And what would you do in those cases? Call up and tell anyone? A. That is right.

Q. Who would you call? A. Two people: The Commander and the person responsible for making the appropriate entries in the attendance form.

Q. Now, were you entitled to a certain amount of sick leave under certain conditions? A. That is correct.

Q. Do you know how much sick leave you were entitled to per year, or per week, or however it was, what-
393 ever the system was? Tell us what it was. A. I believe at that time it was accrued at the rate of 120 hours of sick leave per year.

Q. By that time, you are referring to 1958? A. May 1958, or at the time I took over the duties of aircraft maintenance.

Q. It was measured in terms of hours, is that correct? A. That is correct.

Q. And were the hours credited if you were entitled to cumulative pay over a period of time? A. They were.

Q. Now, if you were absent for other reasons other than sickness, if you wanted to just have some absence to do something of a personal nature, were you entitled to take a certain amount of leave for that purpose? A. We were.

Q. Do you remember how much or what the system was on that? A. I believe that accrued at the same rate, 120 hours a year.

394 Q. And if you wanted to have such leave, did you apply for it in advance? A. That is normal procedure, yes.

Q. To the same people that you notified in cases of sickness? A. That is correct.

Q. Who are these people, by the way? A. That would be the Commander and—

Q. You mean the Base Detachment Commander? A. The Base Detachment Commander.

Q. Yes. And the other one— A. —would be the administrative clerk who would be responsible for maintaining the records.

Q. You mean the administrative clerk who kept the time and attendance records? A. That is correct.

Q. Was your pay based upon those time and attendance records, do you know? I am talking about your pay now, and I am speaking about the base supervisor, or, rather, aircraft maintenance supervisor. A. It is my understanding, yes, it was based on the number of hours that you were in attendance or legally absent.

395 Q. All right, if you exceed the number of hours authorized for sick leave, or for vacation, or annual leave, whatever the exact term would be, if you exceeded the number of allocated number of hours, did you suffer a reduction in pay? A. I understand you would.

Q. I take it that never happened in your case, though. A. Not to my knowledge.

Q. All right. Now, were there any other kinds of leave that you were authorized to use besides the two that I

have already mentioned? A. Your authorized leaves were attendance at the summer encampment, summer training.

Q. That would be for those two weeks, the normal two weeks period that you mentioned before in your testimony?

A. That is right.

Q. What kind of leave would that be called- I take it that is apart from those other two as we have talked about, annual leave and sick leave. A. That is correct.

Q. Would that be perhaps called military duty or
396 something like that? A. I suppose that is the general term of it.

Q. Anyhow, the hours of leave which were used in that manner were separate and apart from leaves which you used in those other categories? A. To my understanding, yes.

Q. That applied when you went to summer training periods. Did it apply to any other time? Were there any other training periods for example than this summer encampment that you have referred to where that kind of leave could be taken from your civilian or from your employment as aircraft maintenance chief? A. Only for special reasons. I know of no set policy.

Q. Now, during the course of a year, in addition to these two weeks summer training periods, you also had other training periods, didn't you, that lasted for maybe a couple of hours at a time, some kind of weekly meeting, perhaps, something like that? A. We had our training assemblies, that generally lasted the entire day.

Q. That was training in connection with your
397 status as Captain, or before that as a Lieutenant in the Air National Guard? Would that be the nature of that training? A. That is correct.

Q. And would you say these periods would last all day when you had them? A. That is correct.

Q. About what time would they start in the morning?
A. The general training assembly started at nine o'clock in the morning.

Q. Yes. And how often approximately did you attend these, say during the year 1958? A. Roughly twice a month.

Q. And on what days of the week would they normally come? A. They were on Saturdays.

Q. Would you take leave from your job as Aircraft Maintenance Chief or Base Maintenance Supervisor in any form to attend those sessions? A. Not necessarily.

Q. Well, you mean you were present for duty in your capacity as Base Maintenance Supervisor or Aircraft Maintenance Chief on those Saturdays? A. No, sir.

Q. You were not? Well, how were you carried on the records? A. I stated that normally our work week is Tuesday through Saturday.

Q. Yes. Well, Saturday is a work day then normally? A. Normally.

Q. And then those meetings I understood came on Saturday? A. That is right.

Q. Now, how were you carried on the time and attendance records as respects your job as aircraft maintenance chief? A. I say again the normal work week is Tuesday through Saturday. However, where a general assembly interfered with a normal work week, then as air technician you could compensate your air technician status by working another day, Sunday or Monday, or possibly on a night duty of some kind.

Q. Oh, I see. In other words, you ended up in any given week as spending actually forty hours on your air technician's job? A. That is correct.

Q. And if your training period happened to come in a normal work week, you worked some other day? A. That is correct.

Q. Now, in other words, any time that you spent in training as distinguished from working at your air technician's job, that was made up that week, or at least in and around that time, by working at other times, so that your total

time spent working at your air technician's job averaged out forty hours a week? A. That is correct.

Q. Now, part of your training duties and requirements in your capacity as a Captain in the unit, and before that as a lieutenant, were used in making training flights, is that correct? A. I had a commitment to fill the training criteria.

Q. Let me put it this way: You did from time to time make training flights? A. That is correct.

Q. And in which you took an airplane and piloted
400 it to some place for a period of time. Did you ever make any of those flights during the normal working hours you have mentioned in connection with your air technician's job, that is to say, between eight and four-thirty, Tuesday to Saturday? A. I did.

Q. And did you do that frequently or infrequently or about how often would you say? Let us take the year 1958. A. I don't know how often this could be determined.

Q. Well, I realize that, but in a general way, would you say once every, oh, say once every month, or more often or less days than that? A. More often.

Q. Once a week perhaps? A. Perhaps.

Q. And what was the average?

Mr. Wolcott: Wouldn't the flight records show that?

Mr. Pettibone: Yes.

Mr. Wolcott: I am sorry.

Q. (By Mr. Pettibone) About how long—if those flights had an average length or duration, about how long
401 would that be? Would you normally make a flight for an hour or several hours, or perhaps you can't say.

Mr. Wolcott: I object to the form of the question.

Mr. Pettibone: Let me reframe it. I will withdraw it.

Q. (By Mr. Pettibone) Now, what was the average length of time or duration of those flights? A. I would assume the training flights were generally from an hour to an hour and a half in duration.

Q. When you would make such flights during a normal day's working hours, for an air technician such as yourself, did you make up that time at some other time during the week, the same as you did with the other training? A. Not necessarily.

Q. How were you carried on the roster during that period as to time and attendance in your air technician's capacity or employment? A. Present.

Q. Well, did you sometimes make up the time consumed in the training flights by working extra hours that week?

Mr. Wolcott: I object to that. It has already
402 been answered.

Mr. Pettibone: No, he said sometimes, and I want to know what it is.

The Witness: I said not necessarily.

Q. (By Mr. Pettibone) Well, that is not an answer to the question, really. That is not an answer at all. And I would like to have the answer to it.

Mr. Wolcott: I object to you arguing with the witness.

Mr. Mudd: Let us retrench now. What is the question? Did he ever make up the time that he spent in flying away from his air technician's weekly and hourly requirements?

Mr. Pettibone: Yes.

Mr. Mudd: All right.

Can you answer that, please?

A. Well, I am not aware that that requirement existed.

Mr. Mudd: All right.

Mr. Wolcott: All right.

Q. (By Mr. Pettibone) I am sorry, but that still
403 is not an answer to my question.

Mr. Wolcott: He has answered it.

Mr. Pettibone: That is not an answer to my question.

A. I don't recall. Let me answer it this way: I don't recall that specific instance where I set aside a portion of the time to compensate the air technician program for having flown. However, there may have been many times that I gave time too. I don't remember that there is any

specific instance that I can say that I deliberately set aside a portion of the time to compensate the air technician's program.

Q. (By Mr. Pettibone) Well, could you state it the other way around? Were there any times when you did compensate for your air technician's program, as you call it, by working additional hours?

Mr. Wolcott: I submit he has already answered it.

Mr. Pettibone: No, he has not answered this question.

Mr. Wolcott: Before that, he answered this particular question.

Q. (By Mr. Pettibone) Well, there is a question. 404 Will you answer it, please? A. I don't recall any particular instance that I worked any additional hours to compensate the time I may have flown during a normal working day.

Q. Well, then, in other words, you used some of these forty hours per week on your air technician's time, in some part of that time each week, or some weeks, at least, that was devoted to flying?

Mr. Mudd: Objected to. The witness has not said that, Mr. Pettibone, but he said—

Mr. Pettibone: Then I would like to have him correct me where I am wrong. That is what I am asking him, is that right or wrong.

Mr. Mudd: Just a moment. I object to the suppositions contained in your question and the inaccurate conclusions drawn from the witness' answers. He said he does not recollect. He has not said it did not happen or it did happen, but he does not recollect, and there is a major distinction there.

Mr. Wolcott: Well, just to put in my objection here, I don't quite agree with either Mr. Pettibone's or 405 Mr. Mudd's summary. As I understand it the witness has already testified that he flew a part of his training program during the hours from 8 to 4:30. He said that a number of times. And I don't think that it can

be summed up or characterized, because the record already states what he says about it.

Mr. Kieffer: I concur in that objection.

Q. (By Mr. Pettibone) Well, then, apart from any specific instances, do you have any recollection in general as to whether or not you worked extra hours to compensate for the time during normal working hours in a week you might have spent in training flights?

Mr. Kieffer: I object.

Mr. Wolcott: I object too. He has already answered it several times.

Q. (By Mr. Pettibone) Well, answer it again, anyhow.

A. The only answer I can give you, Mr. Pettibone, is that I have no recollection of compensating the air technician's program for any portion of the time that I may have used for flying, as a specific case, or as a general case.

I might make one addition to the answer.

Q. You mean you want to change your answer?

406 A. No, I don't want to change my answer, Mr. Pettibone. I would like to make an addition to the answer.

Q. All right. A. We are authorized, or as a pilot you are authorized certain flight training periods.

Q. By whom? A. By the National Guard Unit, by order of the Air Force, as I understand it, in which case you can by satisfying certain requirements, such as time spent flying and time spent in certain other functions, receive compensation, I believe to the amount of one day's pay per flight training period, and there have been cases possibly where I flew as an air technician, in air technician work, during an air technician's work day, and the time taken from that was subsequently made up to satisfy the air technician's work day and the flight training period requirements.

Q. Were you told by your counsel to give this additional information and perhaps add it to your previous answer to my question?

Mr. Mudd: Mr. Pettibone, if you had been looking at

407 this end of the table, you would have seen him lean to me and asked me if he could make an addition to it, and I said, "Yes, go ahead and make the addition." I have had no conversation whatsoever with Captain McCoy, and I resent Mr. Pettibone's suggestion.

Mr. Pettibone: I just inquired how it happened.

Mr. Mudd: No, you did not just inquire either. And I will ask Mr. Wolcott, sitting right across the table, if my statement is not correct.

Mr. Wolcott: That was my impression.

Mr. Pettibone: Well, I don't think it serves any purpose for us to go into it.

Mr. Mudd: I should say it does not.

Q. (By Mr. Pettibone) Let me ask you this, Captain McCoy, do you receive any compensation from anyone for the time you spent in flying status, that is to say, when you performed those training flights that we are referring to? A. There are a certain maximum number of flight training periods that a pilot can accomplish throughout a year, or a quarter, and during the training assemblies is the only compensation to my understanding you can receive for flying. However, flights may be conducted beyond 408 these periods.

Q. Well, if you fly the normal number of required hours, do you receive compensation of some kind for it?

A. Required to what extent?

Q. Well, you just mentioned certain requirements, that you had to spend so much time flying. Didn't you have to spend so many hours then in a given period, say such as a year, in order to maintain a certain status? There are requirements to that effect, are there not? A. The requirement is not to satisfy a monetary charge.

Q. No, the number of hours, I said. I did not mention monetary. A. This number of hours is specified by the regulations, and I would have to fly more hours, for me to accomplish a certain amount of flying training.

Q. All right, so you have to spend, in order to comply

with this regulation, you have to actually spend so much time flying, do you not? A. That is correct.

Q. Now, my question is this: If you spend that
409 amount of time that is required, do you receive any monetary compensation for it? A. Possibly.

Q. Well, do you happen to know? A. Possibly.

Q. Does that mean yes? A. It does not mean yes or no, Mr. Pettibone.

Q. Does it mean that you don't know? A. Mr. Pettibone, I may or may not receive compensation for flying.

Q. That is not an answer to my question.

Mr. Mudd: That is the witness' answer.

Mr. Pettibone: I want an answer to the question to the witness.

Mr. Mudd: That is the witness' answer.

Mr. Pettibone: You know it is not the answer, Mr. Mudd.

Mr. Mudd: Well, that is the witness' answer.

Mr. Pettibone: Mr. Mudd, I wish you would bear in mind that I have the right under the Rules of Civil Procedure under the Rules to stop this proceeding at this
410 point and go before a Court and request the Court to instruct the witness to answer a direct and precise question in a matter of this kind.

Mr. Mudd: That is your option. He has answered the question.

Mr. Pettibone: That is not an answer to my question.

Mr. Mudd: That is your option. But you are making the accusation that the witness knows it.

Mr. Pettibone: I don't make that accusation, and if you are making the statement that I am making that accusation, I deny that I am making any accusations, or that I made any. I did not make any accusations, and I am not making any accusations. So the record is straightened out on that point.

Mr. Mudd: Well, the record is there.

The Witness: Will you restate your question, Mr. Pettibone, and maybe I can be more specific in the answer.

Mr. Pettibone: All right, let me ask the Reporter to please re-read the question.

(Question read by the Reporter.)

A. I can answer it this way, Mr. Pettibone, that it 411 is very possible that I can fly on the 24 training assemblies that they have during the year, and I would receive compensation, but I might not satisfy the requirements as laid down by the Department of the Air Force and who placed me on flying status, and then I would be required to fly on other days without necessarily being compensated.

Q. (By Mr. Pettibone) Well, if you did satisfy the requirements of the Air Force Regulations, would the flying which you did to satisfy them result in your receiving monetary compensation? A. I don't believe it would be possible to satisfy them in 24 days.

Q. I don't understand what you mean by satisfying them in 24 days. I mean satisfying them in whatever time period the regulation itself provides. A. Well, I get paid for 24 training assemblies per year. All forty-eight training assemblies that were accomplished in 24 days.

Q. Yes, and that means any 24 days out of a calendar year? A. That is not true necessarily.

412 Q. Well, 24 days out of a calendar year? A. Yes, 24 specified days.

Q. 24 specified days out of a calendar year? A. Yes, sir.

Q. All right, if you meet that requirement, do you receive compensation; financial compensation, for it? A. I receive financial compensation for the 24 days, yes.

Q. Does part at least of the 24 days requirement however include or involve flight time, that is, flying an aircraft? A. They generally would require flying, yes.

Q. So that in flying an aircraft you are accumulating time to the satisfaction of the 24 day requirement at any given time? A. My primary duty on those 24 days would not be to fly aircraft, but my primary duties would be to perform the duties of an aircraft maintenance officer. How-

ever, flying could and probably would be conducted in those 24 days.

413 Q. Well, let me go back. Possibly this is repetitious, due to the little break here. Do I understand that you said that in performing the flying activity you would be accumulating time toward the ultimate possible satisfaction of the 24 day annual requirement? A. That is not correct.

Q. Well, will you restate it and make it correct for me. I may not have it quite right. Please set it straight for me, if you will be so kind. A. I said that during these 24 days my primary duty would not be to fly an airplane necessarily but could conceivably be part of the program. My primary duty would be as an aircraft maintenance officer.

Q. Well, would your duties as aircraft maintenance officer, or aircraft maintenance chief rather, I believe, which is the correct title according to the orders which are before us as United States Exhibit No. 3, would the duties of that position require you to perform training flights? A. As an aircraft maintenance chief?

Q. That's right. A. That is not my job description 414 on these 24 days that I have reference to.

Q. In other words, the flying the aircraft relates to the 24-day requirement of the Air Force Regulations, is not part of your job description as an aircraft maintenance chief? A. That is not true.

Q. Well, what is true? A. Flying an aircraft is part of my requirement to satisfy the Department of the Air Force, since they have given me the rating and require that I make frequent and regular aircraft flights and satisfy certain minimums as outlined in Air Force Regulation 60-2 and other manuals; has nothing to do with job description.

Q. It has nothing to do with your job, or the description of the job, or the duties of the job of aircraft maintenance chief? A. That is correct.

Q. All right. We have referred to these flights which you made from time to time for training purposes. Are these

sometimes called proficiency flights, or proficiency
415 training flights? A. They are.

Q. Would that be a proper way to refer to them? I mean is that the correct way to refer to them, according to usual terminology? In other words, what are they commonly called? A. I think proficiency is the general accepted broad term for the flights.

Q. All right. Now, in addition to proficiency flights of this nature did you make any other kinds of flights at any time? A. I did.

Q. How would you describe those flights? A. I have made flight check flights on the aircraft and equipment, in which there is an element of proficiency gained.

Q. What do you mean by a flight check flight? What is the specific purpose of a flight of that nature? A. I was qualified to evaluate the condition of an aircraft after, for instance, certain maintenance had been performed; to be a flight check of the equipment that was—it would be a flight check of the equipment.

416 Q. That would be a different kind of a flight from a proficiency flight then? A. Proficiency would be attained in that flight as well as in the other flight, or maintained.

Q. Yes, I suppose one could say any kind of a flight you make for any purpose would in that respect be a proficiency flight, would it not? A. I would think so, yes.

Q. But I am not referring to that aspect of it. This would be a flight made for a purpose specifically other than proficiency. The proficiency, in other words, would be only incidental, is that correct? A. Possibly.

Q. Well, excuse me now, Captain McCoy. I don't like the answer "possibly" because it is either yes or no. Could you say one or the other for me? A. I think I stated a moment ago that proficiency is the broad term that is applied to flights, since, as you have stated, an element of proficiency is gained from all flights. Now, I will not dif-

ferentiate between one type flight and say it is a proficiency and the other type is not a proficiency flight.

417 Q. No, I realize that and that is not what I asked you. The question is this: The specific, immediate purpose of a check flight is not your proficiency, if you make it to determine mechanical condition of the aircraft, is that right? A. That is correct.

Q. All right. Did your employment as aircraft maintenance chief involve a requirement that you make from time to time check flights, that is check flights or maintenance operational checks? A. There is no requirement to my knowledge in the job description of an aircraft maintenance chief that he be a rated pilot and be required to make flight checks or other checks on the equipment.

Q. Now turning specifically to the day of May 20, 1958—

Mr. Wolcott: Could you excuse me a minute. Could you read the last question and answer back?

(Question and answer read by Reporter.)

Mr. Wolcott: Before you ask the next question
418 I'd like to move to strike out the answer as not responsive.

The Witness: I would be happy to make an addition to the answer if it will help.

Mr. Wolcott: Go ahead. Make an addition.

The Witness: To further answer Mr. Pettibone's question let me say that—

Mr. Pettibone: Well, now hold it just one moment, please, Captain McCoy, before you proceed.

Mr. Wolcott: He has a right to complete it.

Mr. Pettibone: I didn't say he didn't. I just asked for a moment's pause.

Mr. Wolcott: Okay. I'm sorry.

Mr. Pettibone: Well, you have something further you want to say, Captain McCoy?

The Witness: Yes, as an addition to the answer to your question, since I was in the capacity of aircraft maintenance officer for the 104th Fighter Squadron—

Mr. Pettibone: Excuse me. You mean as aircraft maintenance officer you are referring to your capacity at that time as a Captain——

The Witness: That's right.

419 Mr. Pettibone: —in the Air National Guard, as distinguished from your employment as aircraft maintenance chief. Is that what you mean?

The Witness: That is correct.

Mr. Wolcott: No. I don't see what——

Mr. Pettibone: Well, he said officer, Mr. Wolcott, and the term here is "chief".

Mr. Wolcott: I understand then he has three jobs. His job as an Air National Guard Captain is one. Then the other job is aircraft maintenance chief.

Mr. Pettibone: That's right, two jobs.

Mr. Wolcott: But you are making a third one, aircraft maintenance officer.

Mr. Pettibone: He used the term "officer". Let the Reporter read it back.

Mr. Wolcott: Maybe he used it, but I am trying to get it straight.

The Witness: In my capacity as a Captain in the Air National Guard, with the job description of an aircraft maintenance officer and being qualified to perform flight checks on equipment, and as I stated before there is
420 no requirement in the aircraft maintenance chief job description to make these flights, but since I was there full time and had this dual responsibility then again with an eye for safety in the best operating equipment I felt that it was necessary that these flights be accomplished and in the absence of the base maintenance supervisor, who would normally make these flights, I did so. I accomplished them.

Q. (By Mr. Pettibone) Well, I gather what you mean is what you are saying is that you, in a dual capacity——

Mr. Wolcott: I object to your summation, Mr. Pettibone.

Mr. Pettibone: I am asking a question.

Q. (By Mr. Pettibone) You had a dual capacity?

Mr. Wolcott: I think he has already answered and I think you should put a question, not summarize.

Mr. Pettibone: I am putting a question.

Q. (By Mr. Pettibone) You were in a dual capacity, is that right? A. I had two job descriptions, yes.

Q. Now, in one job description you were an Air-
421 National Guard Captain, is that correct? A. It is my understanding that I was an Air National Guard Captain all the time.

Q. Yes, I realize that all the time in one capacity you were an Air National Guard Captain. In the other capacity you were an aircraft maintenance chief? A. I was an Air National Guard Captain and aircraft maintenance chief.

Q. Now, in the first capacity could you make maintenance, operating check flights? A. In the first capacity, yes.

Q. In the other capacity was that part of your job? Could you make them? A. I could make them, yes.

Q. Was it part of your job to make them in that capacity? A. I was still a Captain in the Air National Guard and—

Q. That is what we talked about first. Now I am talking about the other capacity.

Mr. Wolcott: Wait a minute. I think you have gotten it all the way around. I thought first was the air-
422 craft maintenance chief. Is that the way you understood it, Captain, first capacity?

The Witness: Well, let me answer.

Mr. Mudd: Just a minute.

Mr. Pettibone: Please, Mr. Wolcott, will you let me finish my questions and then object to them?

Mr. Mudd: Captain, answer the questions that are put to you.

The Witness: Well, I want to clarify this first and second capacity that has been brought up.

Mr. Mudd: It has been gone over. Mr. Pettibone has a question. Hear the question and then see what it is. Let's have the question.

Q. (By Mr. Pettibone) Now in hopes we can keep this clear between us, Captain, I will start again all over. In one capacity you were a Captain in the Air National Guard and were in that capacity acting as aircraft maintenance officer? A. That's correct.

Q. In another capacity you were employed by the 104th Fighter Squadron as an aircraft maintenance chief?
423 Mr. Mudd: Object. I don't like the words "employed by the 104th." It is possibly misleadingly classified. It might be better—

Mr. Pettibone: I think your objection is well taken. Let me rephrase that question.

Q. (By Mr. Pettibone) You were also at the same time employed in the capacity of aircraft maintenance chief, is that correct? A. That's correct.

Q. Now did your status as aircraft maintenance officer, the duties of that assignment and position require you to make maintenance operational check flights of aircraft? A. As a rated pilot and being required to perform certain flights to satisfy the Department of the Air Force and having fulfilled the qualifications necessary to make me capable of performing operational checks on aircraft, then part of my duties I assume would be the responsibility for the aircraft and to test fly them or to flight check them.

Q. All right. Now, in the other capacity in which you were employed as aircraft maintenance chief were you either required or authorized in that capacity, distinguished from this other one, to make maintenance
424 operational check flights of aircraft? A. I don't believe any aircraft maintenance chief, per se, is authorized to make aerial flights. The authorization comes from the Department of the Air Force.

Q. Now turn specifically to May 20, 1958. Do you remember what time you reported to work that morning?

Mr. Mudd: I am going to object again if we are getting into his minute by minute, hour by hour movements on May 20th inasmuch as it was gone into in extensive detail on the original. If you have some pertinent questions I

don't mind the question on that, but if we are going to take it from the beginning of the time he reported to work—

Mr. Pettibone: No, I didn't have that in mind. I don't want to take up the time myself either to go all over every little detail. I do have a few items that I hope I can get to properly and without any delay.

Mr. Mudd: All right.

Q. (By Mr. Pettibone) I would like to start off with the question which I just asked. Do you remember what time you came to work that morning May 20th?

425 A. Approximately 8 o'clock.

Q. Now, you had planned to make a proficiency training flight on that day previous to May 20th, had you not?

Mr. Wolcott: I object to leading the witness.

Mr. Pettibone: Well, how can I speed the thing up if I don't ask him leading questions, because it is already in here. He stated it.

Mr. Wolcott: That's all right, I say, but I think you ought to conduct it just by questions in proper form.

Q. (By Mr. Pettibone) When you came to work on May 20, 1958, did you have any plans to make a proficiency training flight that day? A. I did.

Q. When had you first made those plans? A. On the previous Saturday.

Q. Had you spoken to anyone about the plans? A. I had.

Q. To whom had you spoken? A. Colonel Kilkowski.

Q. What specifically had you said to him in that
426 connection? I mean summarize what you said to him in that connection.

Mr. Mudd: Objection. It is all repetition. It has been covered before.

Mr. Wolcott: I join in the objection.

Mr. Pettibone: Well, obviously between Mr. Wolcott and Mr. Mudd I wouldn't be able to ask any questions.

Mr. Mudd: That is not correct.

Mr. Pettibone: If I ask a leading question Mr. Wolcott objects. If I make a direct question Mr. Mudd objects.

Mr. Mudd: I think you have done pretty well.

Mr. Wolcott: That is the first time I interposed that kind of objection after three hours or so.

Mr. Pettibone: Well, I haven't equalled your time yet, Mr. Wolcott, in spite of the three hours.

Mr. Mudd: God forbid.

Mr. Wolcott: Well, it is there for you to shoot at.

Mr. Pettibone: Let's have a five minute break.

(Thereupon, there was a short recess taken.)

427 Q. (By Mr. Pettibone) Did you mention to Colonel Kilkowski on the Saturday preceding May 20, 1958 that you wanted to take a passenger with you on the plane? A. I believe that is in the record, Mr. Pettibone.

Mr. Mudd: Just a minute. And for the record I am going to object and instruct the witness not to answer any further questions dealing with May 20th inasmuch as it was covered extensively at the prior two sessions of the deposition and the copies of those depositions have been available to counsel for the Government for some two or three weeks at this time and now to go back and ask questions which have already been covered seems to me to be within the Federal Rule granting the witness protection from harassment.

Mr. Pettibone: Do you mean you object?

Mr. Wolcott: Well, I'd like to note that I disagree with Mr. Mudd here. I think the counsel of the Government has a perfect right to cross examine.

Mr. Pettibone: I just want to get one thing clear. Do you refer to any question I asked him about the events of May 20, 1958? That is what you said.

428 Mr. Mudd: No. I understood originally, Mr. Pettibone you had several specific points that you wanted cleared up or brought out. I have no objection to those, but to go back to items that have already been covered, to me seems burdensome and harassing the witness, which the witness should be protected from, I think. I also understood at the beginning of the deposition that counsel would attempt in an orderly fashion to let Mr. Galihier conduct

the original investigation and that there would be an attempt by counsel thereafter not to plow the same field and in my judgment this field has been well plowed in the last two Saturdays to which Captain McCoy submitted to deposition.

Mr. Wolcott: Well, I'd like to say in view of the remark of Mr. Mudd that I entirely disagree with him. I have gone over the record and I don't think the ~~lead~~, to use the colorful description supplied by Mr. Mudd has been—that the same furrow has been plowed twice. The field may have been better plowed, but not the furrow and I certainly don't object and I think Government counsel has the right to cross examine.

Mr. Mudd: See. Now, Mr. Wolcott is on your side,
429 Mr. Pettibone.

Mr. Wolcott: Well, I think he has a right—

Mr. Pettibone: Well, you will force me, if you instruct the witness not to answer the next question which I have, you will force me to terminate the proceeding, Mr. Mudd, so we can take the matter before the Court.

Mr. Mudd: It is all right.

Mr. Pettibone: Because I think you are denying my rights, the Government's rights, the United States' rights.

Mr. Mudd: That's all right.

Can I confer with my client for a moment?

Mr. Pettibone: Certainly. Go right ahead.

Mr. Mudd: Captain McCoy says he thought you were under the impression that I had said "any question." I didn't mean to imply any question. I accepted your suggestion earlier that you had a few points you wished to bring up and if they are new points or unclear points or additional points I, of course, have no objection to them but I do object to covering the same material that has already been covered, and if you'd care to discuss with me in private or in public the general areas that you wish
430 to inquire into perhaps it can be worked out.

Mr. Pettibone: Well, I am endeavoring to the

cedures, which meetings we attended, and we are still continuing to abide by it."

549 Q. Do you recall making that statement, Captain?

A. I recall making the statement.

Q. I will show you a transcript of it (handing transcript to witness).

MR. MUDD: He said he recalled making the statement.

MR. WOLCOTT: All right.

A. I recall making the statement.

MR. WOLCOTT: Do you want to make any qualification of it, whether he made it or not.

THE WITNESS: If you are going all through that testimony, I will see that there was a discrepancy on the point of time, because the C.A.B. people asking the question did not pinpoint the point of time, and I don't know whether this particular thing refers to May 20th, and we never had been clear on it at the C.A.B. Hearing, as to what point of time we were speaking about.

Q. (By Mr. Wolcott) Captain, if you want to make any qualification or further clarification of that statement, you will feel free to do so. You are free to make any further statement, and you can go right ahead.

550 THE WITNESS: There have been, and there were meetings prior to the accident on May 20th and there were meetings subsequent to the accident on May 20th.

MR. WOLCOTT: Okay.

THE WITNESS: Exactly which were which, it would take some research to find out right now, Mr. Wolcott.

Q. (By Mr. Wolcott) Well, now, you testified on July 2, 1958, and the accident took place on May 20, 1958, is that right, sir? A. That is true. That is true.

Q. All right. That is just an interval of a little over a month and a half, so obviously you were thinking about meetings before the accident, unless you can think of any meetings you had in that interval of a month and a half?

A. I had meetings—

MR. MUDD: Just a minute. There is no question posed as to that.

Q. (By Mr. Wolcott) Is that right? A. I had meetings with Mr. Wederburn, Mr. Simpcox. I can't remember the other gentlemen's names, but they were in the hearing at the Washington Center, down at the C.A.A.

551 Q. When? A. I cannot remember the point in time.

Q. Yes, but was it before or after the collision?
A. It was either before or slightly after the accident.

Q. Yes. A. Well, he discussed the inauguration of a new jet approach into the Baltimore area.

Q. Well, Captain, I read you the statement, and if you like, I will read it again.

Do you state that it had no application, no activities on your part prior to the accident?

MR. MUDD: Just a minute.

Q. (By Mr. Wolcott) You can look at the statement.

MR. MUDD: The witness has already testified that there were meetings before the accident and after the accident, and to what point—

MR. WOLCOTT: I want to get an answer to the question.

MR. MUDD: All right, but let me finish the statement.

552 MR. WOLCOTT: Go ahead.

MR. MUDD: And as to what point of time you have specific reference to, we don't know. I think he amply said he had meetings before and after.

MR. WOLCOTT: Well, you don't know and the witness does not know.

MR. MUDD: Do you mind if I finish, Mr. Wolcott?

MR. WOLCOTT: I want to find out who is testifying here.

MR. MUDD: This man has been testifying since ten o'clock, and you ought to know.

MR. WOLCOTT: I would rather have it from him.

MR. MUDD: And if you listened to the testimony, you would find out that he had meetings before the accident.

MR. WOLCOTT: I heard the testimony, and I asked my question—

MR. MUDD: What is the question?

MR. WOLCOTT: You can ask the Reporter to read it if you want to know.

MR. MUDD: Now, just be quiet, Colonel, until we hear that question.

553 MR. WOLCOTT: You can read the last line of questions back, please.

(Testimony read by the Reporter.)

MR. MUDD: I object because the witness has already stated he had meetings before the accident.

MR. WOLCOTT: I am asking now about that statement.

THE WITNESS: Mr. Wolcott, I don't understand the question.

We had meetings prior to the accident.

Q. (By Mr. Wolcott) With reference to traffic congestion in the Baltimore area, is that correct? That is all I want to know. A. Yes.

Q. All right. Now, do you also know that there had been several aircraft traffic collisions in that area prior to that accident? A. Yes.

Q. All right, when did those traffic collisions take place if you recall? A. I don't recall the exact dates or pinpoint them in time. To pinpoint them in time, I could not
554 do it without any research.

Q. All right, now, other than the rules and regulations that you have mentioned before, did you see any other rules or regulations or orders dealing with the air traffic congestion problem in the Baltimore area insofar as your unit was concerned?

MR. MUDD: May I inquire when now?

MR. WOLCOTT: This all has to do with prior to the accident?

THE WITNESS: Yes.

Q. (By Mr. Wolcott) All right, what were they?

MR. MUDD: Since when, Mr. Wolcott?

MR. WOLCOTT: I don't understand you, Mr. Mudd.

MR. MUDD: Prior to '58 encompasses a long time.

MR. WOLCOTT: Well, we are talking about these meetings and these collisions. What did he do?

MR. MUDD: Your question is not that.

MR. WOLCOTT: I think my question is quite clear, and I will suggest that you listen.

MR. MUDD: I will instruct the witness not to answer the question unless you can let him know the time. I have no objection to him describing any orders, but let the witness know whether it was a year before or two years before. Be reasonable with him.

MR. WOLCOTT: I will try to be, and if I were not being interrupted so much, I would get along much more easily.

MR. MUDD: I guess you would.

Q. (By Mr. Wolcott) Take a period of one year.

MR. MUDD: All right.

A. I would say yes.

Q. (By Mr. Wolcott) What were they? A. I am afraid I am lost. Are we talking about meetings or orders. The question is not clear.

MR. WOLCOTT: Could you read that question over again? I can understand why you lost sight of the question, Colonel. (Question read by the Reporter.)

Q. (By Mr. Wolcott) That is within the last year. A. The last year preceding the accident or within this last year.

MR. MUDD: That is right, preceding the accident.

A. Yes.

Q. (By Mr. Wolcott) All right, what were they? A. Well, there were to my knowledge prior meetings with the C.A.A. to discuss the Baltimore Martin approach, and this is a jet approach, a conventional aircraft approach into the Martin Airport.

Q. So there were no other regulations or orders issued?

A. I am thinking, Mr. Wolcott. I am not finished speaking.

Q. All right, I beg your pardon, go ahead. A. You are taxing my memory. This is two years ago. I can't remem-

ber exactly whether there was a meeting at Washington called by the C.A.A. at that time to discuss problems, mutual problems in the whole Washington area.

MR. MUDD: Colonel, the question is, as I understand it, not meetings, but whether from May of '57 to May of '58 there were any orders issued?

THE WITNESS: Orders? Locally, yes, sir.

Q. (By Mr. Wolcott) Orders and regulations. That 557 is what I asked you about, what they were.

MR. MUDD: Do you recall any specific orders?

A. The specific briefing orders are set within the confines of various plans for different work. The segregation of our acrobatic flights, the segregation of our continental mission flights, where we take them out over the ocean.

I am speaking there in support of the CONAC training director.

In general, with each briefing there is a description of traffic in the area. I should say briefing, but each traffic meeting, training assembly, there is a flying safety discussion, and many times this was discussed and orders given to be on careful watchout for other aircraft.

Q. And that is all? A. To my knowledge at this time, yes.

Q. Was there any change in any regulation or SOP during that period in order to deal with the problem? A. There were changes in SOPs during that period.

Q: What kind and what were they? A. Mr. Wolcott, I could not answer that question. It is three years ago, 558 and what is the SOP and what the new one said, I could not tell you.

Q. Well, I am asking about substantially to the best of your recollection, Colonel? A. To the best of my recollection, there were changes in SOPs, local SOPs, and there were other instructions given to us by higher authority on congestion, but exactly what they were, I don't know.

Q. What is this high authority that you are talking about, Colonel? A. We received information instructions from various sources, one being the work on flying safety at Nor-

ton Airport Base, which is constantly keeping us up to date on flying safety conditions.

The other is from our wing, the 113th Fighter Wing located at Washington.

The other is through the 14th Air Force, and the Air Force advisor.

The other is, of course, the Continental Air Command.

But we receive information from various agencies and instructions. Generally the instructions come out in the form of regulations and directives.

Q. Well, Colonel, could you furnish us with copies of any regulations or SOPs that had to do with air traffic safety or collision avoidance that were promulgated during the year May 1957 to May 1958?

MR. MUDD: Is that the completion of the question?

MR. WOLCOTT: Yes.

MR. MUDD: You can appreciate, Mr. Wolcott, any operational orders or SOPs or orders that can be made available would depend on a lot of restrictions.

I will say this, that if you in due course will funnel any request through me, I will discuss it with the unit involved and determine whether or not they can be made available.

MR. WOLCOTT: Well, I am making my request now, Mr. Mudd. And I, of course, realize that it would be subject to security or such restrictions.

MR. MUDD: Excuse me just a second.

MR. WOLCOTT: Yes, sir.

(Mr. Mudd and witness in conference.)

MR. MUDD: Mr. Wolcott, Colonel Kilkowski has advised me that for some of the directives and regulations and so forth which came from the various organizations, such as CONAC that he mentioned—

MR. WOLCOTT: Yes.

MR. MUDD: —Continental Air Command—

MR. WOLCOTT: Yes.

MR. MUDD: —and others would have to be secured through him with the local SOP's Special Agent, where

some of them have been destroyed, and the ones that were in existence at the time we picked up in connection with the CAB Hearing, and they currently have none available which would serve your purpose.

I think I state you correctly, don't I?

THE WITNESS: Basically, yes.

I think, Mr. Mudd, that the various instructions issued probably could be obtained from the historical records of the agencies issuing them.

For instance, Flying Safety comes out with a magazine which they published, which has a lot of this information in it. And we don't necessarily keep that, but I am
561 sure that they could supply it.

Q. (By Mr. Wolcott) Well, Colonel, let us put it this way: Such changes or regulations new regulations, as came into effect during this period, insofar as they affect local flying, were incorporated in the SOP, is that right, sir?

A. Not necessarily. They could be. We don't duplicate every regulation. We issued SOPs as needed, but they are not necessarily all incorporated in the SOPs.

Q. All right. I see. Now, Colonel, what regulations, so that we understand each other clearly, what regulations govern a flight of a T-33 taking off, a local flight, VFR, on May 20, 1958?

MR. MUDD: From where?

MR. WOLCOTT: From Martin Field.

A. The Air Force Regulation 60-16 governs the flight.

Q. All right, what others? A. There are other 60 regulations that govern flying.

Q. That governed that flight? A. Other 60 series regulations that govern general flying.

562 Q. I mean that flight. I am talking about that particular flight. A. Well, all those regulations.

MR. MUDD: There are general regulations.

THE WITNESS: 60—

Q. (By Mr. Wolcott) All right, if that governs flying, go ahead. I just wanted to get all of that.

Now, what else governed that flight?

A. Our own peculiar operating procedures, which under higher agency can tell us local operating procedure in our own Tower, what we have to do in the Tower. We have supporting standard operating procedures.

Q. What are those peculiar operating procedures that you have mentioned? Are they set out in writing? A. They are in our SOPs.

Q. They are in your SOPs. It is your SOPs. Well, now, what else? A. The SOPs can't change what is written in the regulations. For instance—

Q. Colonel, that is not what I asked you to do. All
563 I want you to do is list the designation of the regulations governing this flight. You said the SOPs. You said the 60 series. You said the 60 series and the Air Force regulations. Now, what else? A. I could not begin to enumerate them, but all the Air Force regulations that have to do with the flying of an aircraft and the qualifications of the pilot govern that particular flight.

Q. All right, let me just narrow my question down a little bit more, Colonel. I am now talking about traffic congestion. That is the particular question I am talking about. Now, what regulations governed a local VFR flight on a T-33 taking off from Martin Field? A. I can't remember all of them.

Q. Do the SOPs apply? A. They are not regulations.

Q. Well, Colonel, you are a better lawyer than I am. What did you call them? A. They are exactly what they are called. They are Standard Operating Procedures.

Q. All right, let me try again now. What regula-
564 tions procedures, or orders—is there any other category? Written instructions? A. Directives.

Q. Directives. Anything else? Any rules, manuals, regulations, and so forth—that governed a flight of a T-33 in the local mission take-off, and flying under VFR from Martin Field, with reference to traffic congestion and separation? A. Air Force Regulations.

Q. Is that series 60? A. Series 60, Series 55. I can't remember them, like I say, I can't remember all the numbers.

Q. Well, okay. What else? A. Whatever numbers would apply.

Q. All right, what else? A. The Air National Guard Regulations.

Q. What number? A. They are basically the same numbers.

Q. All right, what else? A. And our local procedure.

565 Q. What is that, SOP? A. SOP, sir.

Q. All right. Now, Captain, what is the air speed of a T-33? A. It varies.

Q. What is the normal cruise speed? A. That question cannot be answered in that manner.

Q. Well, just the best you can. Whatever qualifications you want to put on it is all right. A. You have two questions to me right now. One of them is what is the air speed of a T-33. I will answer that. I will say that it runs between zero and say 500 knots.

What is the normal cruising speed of a T-33 would be dependent upon what your mission was, how far you were going, how high you were flying, what your load was, and so many factors, that I could not begin to give you an answer right now unless you prescribed all the factors, and even then I would have to look in the book to find out what the answer would be.

Q. Well, could you say then, specifically, Colonel, on a local area flight, in the Baltimore area, operating between five and nine thousand feet, with a total flight of say 566 175 miles, scheduled to take about an hour, and say gassed up to an hour and a half, just generally, and you can put in whatever perimeters you like. A. Will you continue to specify the factors in asking your question until we get it nailed down to something I can answer?

Q. I will do the best I can. A. What is the throttle setting?

MR. MUDD: Do you want counsel, Mr. Wolcott?

MR. WOLCOTT: What is that?

MR. MUDD: Do you want counsel, Mr. Wolcott?

MR. WOLCOTT: Mr. Mudd has been appointed counsel.

THE WITNESS: If you will take a reduced throttle setting—

Q. (By Mr. Wolcott) You are talking about the throttle setting in percentages? A. Percentages?

Q. 85 percent? A. Height of climb.

Q. Yes. A. I guess it would come out to—what is the fuel loading? About 200 gallons?

Q. I will get that for you in just a minute. A. You see, Mr. Wolcott, all these things are variable.

Q. Yes. I will be very happy to supply whatever we have here. I am glad you asked that question.

MR. MUDD: Maybe you could shorten it up by asking if he is familiar with the loads carried on the flight, and then ask him on May 20th—

MR. WOLCOTT: I have it right here, and then we will have it all. All right.

Q. (By Mr. Wolcott) I will ask you if you are familiar with the load on the flight in which Captain McCoy was? A. Not particularly.

Q. Well, I have the weight and balance here, which has been marked Passenger Exhibit No. 5. Perhaps that will help you (handing paper to witness). A. It does not, Mr. Wolcott, because the fuel that was used—this is based on the take-off fuel, and the fuel that would be used between this point and that point, any point subsequent to this, would affect your speed.

Q. Yes. A. These are very important factors. They all affect it. And you are asking a question that just cannot be answered simply. And I am not trying to be evasive.

Q. Well, I know you are not, Captain, I appreciate that. Well, can you give me even a complicated answer? It is all right. A. There are power curves, there are weight curves, there are altitude curves. And all these things are variables. You cannot pinpoint exactly what it is going to be unless you know all the variables.

Q. Well, let me ask you this. Under the operation procedures of your unit, did you impose any speed limitations on aircraft T-33? A. The speed limit boundaries are set up in an operation of this kind.

Q. What were they? A. I don't remember the exact higher speed boundary, but I think it is in the neighborhood of 500 knots.

Mr. Welcott, perhaps I can explain it this way.

Q. Yes. A. If you are making an instrument approach, where the purpose of the flight is partially designed to save fuel and extend time.

MR. MUDD: Did you say where it is not?

THE WITNESS: Where it is.

MR. MUDD: Where it is.

THE WITNESS: You would fly at a reduced speed, perhaps 180 knots, or even slower in some cases.

Q. (By Mr. Walcott) Yes. A. Now, if you were getting from point to point, you would select your most desirable altitude and desirable cruise setting, and you would probably figure it out to around 370 knots. And if you knew that you had had weather conditions at your destination and you had sufficient fuel, and you had the speed available, you might try to get there in a hurry.

So these are all variables that cannot be pinpointed. And I do not think any engineer, let alone myself, could give you the exact speed. Speed is a definite value which is a result of so many variables that it cannot be pinned down.

Q. Have you made a lot of local flights in a T-33 in this area, Captain? A. I would not say a lot. I have made some.

570 Q. Have you made a number of them? A. I have made a number of them.

Q. As nearly as you can, Colonel, what has been your average speed when you were on a cruise? A. True speed or air speed?

Q. Well, let us take them both. Take them both. A. Well, again, that varies with altitude. For every thousand—

Q. I am talking about your average. Take your average. A. For every thousand feet that you go up, you get a different variable. You get different speed. And subsequently you get less air force in your pitot tube, which registers at less speed internally.

This is different from your cruise speed, which again is different from your ground speed, because with ground speed you have a wind variable.

Q. All right. A. So I would say that your true speed at normal cruising, which is ninety some percent, and say 25,000 feet, with 200 gallons loading, would probably be in the neighborhood of 350 to 370 knots. Now,—

571 Q. Suppose you were flying under 10,000 or 9,000 under VFR conditions. A. VFR or IFR has no difference in what your speed would come out to be. It is strictly—

Q. Well, I am quite aware of that, Captain, and you don't have to go into an explanation of that. A. I am not trying to be evasive, but I think any engineer—

Q. I am talking about a local flight, a local flight that you may have made under VFR.

THE WITNESS: Mr. Mudd, these questions are just impossible to answer.

MR. MUDD: I think everybody appreciates that.

Q. (By Mr. Wolcott) Such as the flight that Captain McCoy made, have you ever made the type of flight that Captain McCoy testified about? A. Not the identical type of flight, no.

Q. I did not ask you that, whether you made an identical flight. A. I made a local VFR flight. I did not necessarily go out in the same area.

572 Q. That is right, that is right. A. Generally.

Q. Was the local type of flight that he then testified about unusual in your squadron? A. No.

Q. Generally thinking, or relying on your memory, going back to similar types of flight, what was your average speed?

MR. MUDD: I will object.

A. It cannot be answered.

Q. (By Mr. Wolcott) You cannot answer it. All right.

A. No.

MR. MUDD: On the ground of immateriality.

MR. WOLCOTT: You have your objection.

THE WITNESS: Mr. Wolcott, I am trying to be helpful.

Q. (By Mr. Wolcott) If you can't remember, all right.

A. It is not that I can't remember. The question just cannot be answered.

Q. All right.

MR. MUDD: That is all right. Let it go.

Q. (By Mr. Wolcott) Now, does the pilot in a T-33 have excellent visibility all around him. A. The pilot in a T-33 has good, ordinarily good visibility. He does not have excellent visibility all around him, no. The head rest behind him is an obstruction to vision.

Q. Except for that?

MR. MUDD: Go ahead, finish your answer.

MR. WOLCOTT: I am sorry.

MR. MUDD: You mentioned the head rest.

THE WITNESS: The head rest behind the pilot is an obstruction to vision.

Q. (By Mr. Wolcott) But except for that, does he have clear visibility all around? A. Not below him. There are some areas down the side where the visibility is obstructed by the nose of the aircraft.

Visibility is a matter of comparison, too, Mr. Wolcott. I personally consider it good visibility.

Q. Didn't you testify, Captain, at page 430 of your testi-

mony before the Civil Aeronautics Board—I am reading from it—“The entire upper portion of the aircraft is a canopy, a clear canopy, and it gives the pilot excellent visibility.” A. In that direction, it does.

Q. Just let me finish reading the quotation. A. I am sorry.

Q. “I think without question I would say it is two to three times as good as any transport aircraft.”

Now, do you recall making that statement?

A. I think it is a true statement.

Q. All right. Now, if there is a conflict between Air Force Regulation 60 series and Civil Aeronautics Regulation 60, which is the operating rule that would be adhered to.

MR. MUDD: I assume you are talking about in practice and not as a matter of law?

MR. WOLCOTT: That is right, in practice, yes.

A. To my knowledge, in any conflicts between the two, we would abide by the C.A.A.

575 Q. By the way, these Baltimore area collisions that you mentioned, do you know what type of aircraft were involved there?

MR. MUDD: You are talking about the mid-air collisions prior to May '58?

MR. WOLCOTT: That's right, yes.

THE WITNESS: How far back in time?

Q. (By Mr. Wolcott) Well, talking about the collisions that you recalled, how far back in time do they go? A. There was a collision of a Navy aircraft, I don't know the year. My memory does not serve me on exact numbers and types.

Q. By the way, I think it has been testified here that before an aircraft takes off it undergoes pre-flight inspection. What does pre-flight inspection consist of? A. This is a walk-around inspection of the aircraft to inspect the various surfaces and fuel loading caps that could be opened up, oxygen ports that could be opened, the general condition of

the aircraft, and there is other prescribed minor things of various pressure gauges and things like that.

576 Q. In other words, it is just a superficial, in a relative sense, walk-around and the lowest grade of all the inspections as performed, isn't that right, sir? A. I wouldn't necessarily say the lowest grade.

Q. Is there a type of inspection of the aircraft that is more superficial in a relative sense than a pre-flight?

MR. MUDD: I assume you mean performed by personnel of the 104th?

MR. WOLCOTT: Yes, that's right.

THE WITNESS: I don't know of any that is more superficial, if you want to call it that way: It is the pilot's inspection of the aircraft to satisfy him that he knows the condition of it; there is no fuel leaking, no doors that are open on the aircraft. It is generally a superficial like you say, for flight, you might call it. He doesn't go into the engine, and what-not, and check various conditions of it.

By MR. WOLCOTT:

Q. Now, can a member of the Air National Guard be called to service by the Federal Government without draft? A. He can be ordered into Federal
577 service or he can be called into Federal service and there is a distinction between the two. I think you would best go to the law citing this rather than take my opinion, but, as I understand it, a call is a presidential call where he calls the Air National Guard into service. An order is an order ordering the Air National Guard into the Federal service upon declaration of a state of war or upon declaration of a state of emergency by Congress or the President.

Q. Now, are all members of the Air National Guard reserve members of the Air Force?

MR. PETTIBONE: I object to the form of the question. It calls for a conclusion.

MR. WOLCOTT: Will you answer it?

MR. MUDD: Answer it, if you know.

THE WITNESS: The Air National Guard, Federally recognized units and officers and airmen of the Air National Guard as such constitute a ready reserve component of the Air Force. This is different than the Air Force Reserve. The Air Force Reserve is also a reserve of the Air Force and it might be confusing but to clarify, the reserve of the Air Force is composed of two units, 578 the Air Force Reserve and the Air National Guard of the United States.

By MR. WOLCOTT:

Q. Now, Captain—or I beg your pardon. Colonel—off the record.

(Discussion off the record.)

By MR. WOLCOTT:

Q. Colonel, I direct your attention to AFR55-19, and 19A, which has been marked Passenger's Exhibit 8 for identification, particularly paragraph 3 thereof headed: Control of Air Traffic Near Air Fields, and ask you whether the Commander of your unit established procedures to provide controllers with adequate position reports prior to entry of aircraft into control zone or traffic pattern. A. Yes.

Q. When was this done and what form did it take? A. We established our local flying area at Martin Airport and had several meetings with the control tower people of the Martin Airport and set up procedures for departure and entry into that area, prescribed points of call.

Q. The procedures you refer to are the SOPs? A. Yes.

Q. All right. Now, is your unit subject to regulation 579 issued by the National Guard Bureau in Washington? A. Yes.

Q. The Secretary of the Air Force? A. Is that a different question or the same one?

Q. Well, I am following that up. It was an incomplete question. You are quite correct.

Q. The orders, the regulations—the regulations that come from the Air National Guard or the National Guard Bureau carry the weight of the Secretary of the Air Force. They carry his: By Order of the Secretary of the Air Force, and they carry the office title of the Department of the Air Force.

Q. In the event of conflict does that have greater weight than your SOPs? A. Yes, our SOPs are local procedures prescribed by the Commander and if there were a conflict with any other regulation, Air National Guard or Air Force, the Air Force or Air National Guard would take precedence.

Q. Well, what are these regulations? Could you give the numbers by which they are designated? I am referring now to the National Guard Bureau regulations or
580 the Air Force regulations? A. I couldn't begin to quote them. I merely say that the Air National Guard regulations contain a listing of all Air Force regulations which are applicable to the Air National Guard. The ANG also supplements those with either changes to those regulations or supplements or new regulations.

Q. Well, is there a general series number or an agency designation? A. They enter all series, various series all the way through.

Q. All right. Now, does the series 40 correspond to the National Guard series 75-16 for ground? A. I am not directly familiar with it. I believe that they are both management regulations of the civilian personnel program, but I am not familiar with the contents of the National Guard regulation you refer to. If it were applicable to us it would come out in the form of an Air National Guard regulation.

Q. But generally they correspond, don't they, basically with one another? A. I can't say because I am not
581 familiar with the contents of the National Guard regulation that you mention.

Q. Do you know a Captain Cutair? A. Cutair.

Q. Cutair? A. Yes.

Q. Thank you. Who is he? A. He is the administrative officer of the State Staff of the Maryland Air National Guard. He works as an Air Technician full time with the State Staff located at the Fifth Regiment Armory.

MR. WOLCOTT: Will you mark this exhibit.

(Document dated 2 February 1960 was marked Passenger's Exhibit No. 12 for identification.)

By MR. WOLCOTT:

Q. Now I direct your attention to Passenger Exhibit 12, which is a letter dated February 2, 1960, from Headquarters Maryland Air National Guard, signed by Captain Francis L. Cutair, addressed to Mr. Buckmaster, in which the following is stated in part: "However, the regulations which govern full-time employees are basically the same

for Army and Air," and I ask you if you agree with
582 that statement? A. I can't say that I agree with it because I am not familiar with the National Guard Bureau Regulation 75-16.

MR. WOLCOTT: Do you want to see it?

MR. PETTIBONE: Yes, I would like to. Thank you.

By MR. WOLCOTT:

Q. Under what regulation are you authorized to issue SOPs? A. I couldn't quote you the exact number.

Q. What series, do you know? A. I couldn't quote you that. I'd have to look it up in the index. I think all commands have the right to supplement regulations, such as Air Force regulations are supplemented by CONAC regulations, and what-not, to get them down to the working level, and we do that as a matter of practice and I couldn't quote you the actual authority for it right now.

Q. But is it your impression that under Air Force or Air National Guard regulations you have authority to establish the SOPs? A. We not only have the authority, we have the responsibility. Our inspection Air Force,

which is the 14th Air Force and inspects us yearly,
583 goes into this probably quite thoroughly and require
that we have, as they call them in some cases, internal
operating procedures and in other cases standing operating
procedures.

Q. Now, what is meant by a classified employee? A. To
my knowledge, in the sense that we know a classified employee
it is a NGC rating. That is a classification that goes with
his specific job assignment and these are issued by the National
Guard Bureau.

Q. I see. So that a classification is meant what grade
rather than in a security sense, is that it? A. I'm afraid
I couldn't give you an exact answer.

Q. It is a grade sense rather than a security sense that
the term "classified" is used. You understand my question?
A. Mr. Wolcott, using the broad term, classified employees,
it might apply to various agencies. For instance, the Civil
Service and what-not, Air Force civilian program, they probably
have the same, but if you could get a specific question into
our air technician structure I might answer it.

Q. Well, according to your air technician structure, what
is meant by a classified employee? Is that a separation
584 as to a grade or status? A. There are two types
of employees; those called classified, which are NGC,
and those called, I think they are wage labor board, which
are NGMs.

Q. What is NGC again? A. Classified.

Q. What is NGC? What does it mean? What do the
initials stand for? A. I believe it is National Guard
Classified.

Q. I see. A. I believe.

Q. And what category was McCoy as Air Maintenance
Chief? A. As I said, the structure is constantly changing.

Q. I am talking now of May 20, 1958. A. All right. In
March of 1958 the structure changed and various NGM
classifications were changed to NGML, which is a leader
classification and others were changed to NGS, which is

a supervisory classification. Now, Captain McCoy specifically was in a NGS position at the time of the accident.

Q. Now, what is NGMS. What does that mean?

585 . National

586 tion. It is not specific enough to be susceptible of being answered.

MR. WOLCOTT: Well, my questions all apply to the period prior to—

MR. PETTIBONE: Well, I was referring not to the period but the term "Air Force Flying School", which standing alone might mean anything.

MR. WOLCOTT: You know they don't stand alone, don't you?

MR. PETTIBONE: That is the only descriptive phrase that you use in your question.

By MR. WOLCOTT:

Q. Now, did your unit on or prior to May 20, 1958 receive quotas for recruitment for the Air Force Flying Training School? A. The question doesn't have a simple yes or no.

Q. Well, just answer it the best you can, if you will, please. A. The National Guard, Air National Guard Bureau receives quotas for the Flying Training School. The Air National Guard has a system of replacement of pilots whereby they are assigned a quota and the

587 quota is filled from the various states to go into the Flying Training School and subsequently for these pilots to be returned to the states. The only reason that they would not be returned is if they qualified for regular commission they could remain on active duty.

Q. Is that with the Air Force? A. Yes.

Q. And is that Flying Training School operated by the United States Air Force? A. It is; but to answer your question, we did have at the time position vacancies for that flying training. I think it was two. It was either one or two. I can't remember.

Q. I see, and does that request originate with the Na-

tional Guard Bureau in Washington? A. Request for what?

Q. For recruitment to fill those positions. A. The National Guard Bureau doesn't make a request to the State. It assigns us or authorizes us to fill these positions.

588 Q. I see. A. And the State, through the Air National Guard, makes the selection. These people have to pass the appropriate tests and if they pass, meet the Air Force standards they can go through the school and then be returned to us as Air National Guard Pilots.

Q. Is that authorization made periodically? A. It is made in accordance with the availability of spaces and also the requirements of the Air National Guard at the time.

Q. Were there any military radar installations in the area which controlled the flight of Captain McCoy on May 20th? A. No.

Q. Were there any that control your flights generally? A. At that time we were a Fighter Interceptor Squadron and we had a requirement to work with the ground controlled interception military sites. This is with the tactical aircraft.

Q. From time to time prior to May 20th, '58 did you receive TWXs or instructions from the Air Force?

MR. PETTIBONE: If that is a whole question I object to the form of it.

589 MR. WOLCOTT: Okay. Will you answer that, please?

THE WITNESS: It is a broad question. We did receive TWXs and instructions from the Air Force.

By MR. WOLCOTT:

Q. Directly? A. Yes.

Q. What was Captain McCoy's combat status, if any, on May 20th? A. On May 20th, as of the date of May 20th Captain McCoy was filling on our military TO, I believe, the position of Aircraft Maintenance Officer and as such did not have a true combat status with the unit.

His only combat readiness requirement would be as a Federally recognized officer of the Air National Guard and as such was a member of the ready reserve.

Q. What was Captain McCoy's status with respect to the United States Air Force? A. Could you be more specific, Mr. Wolcott? I could talk for about a half hour on the relationship between Captain McCoy and the United States Air Force.

Q. Well, why don't you go ahead and tell us about it?

MR. PETTIBONE: Well, I object to the question because it calls for the witness to state what is in effect a legal conclusion.

MR. WOLCOTT: Try it, Captain. I mean Colonel.

THE WITNESS: Captain McCoy had a rating of pilot granted by the United States Air Force, or the Secretary of the Air Force. I am not familiar with exactly who grants the ratings. I shouldn't say I am not familiar with it, but I believe it is the Secretary of the Air Force. He has a requirement to participate in frequent aerial flight, which is an order from the Secretary of the Air Force which is, in effect, a flying status recognized as such. He has, in his maintenance activities, liaison with various Air Force Depots in support of his aircraft. He has the responsibility for, or he had at that time the complete responsibility for the maintenance section, which is subject to United States Air Force scrutiny by 14th Air Force Inspection yearly. He has the requirement for training his airmen in accordance with Continental Air Command directive.

Q. That is United States Air Force? A. United States Air Force. There are the numerous TOs and directives concerning maintenance.

591 Q. TOs are technical orders? A. Technical orders, which are his obligation to carry out. He has the direct tie-in with the Air Force advisor people. They have a maintenance sergeant who inspects the various aircraft occasionally and advises him on the condition of those aircraft.

Q. Maintenance sergeant, what is his connection with that unit? A. He works under Major Britton, the air advisor. He is called also an Air Force advisor and Sergeant airman capacity.

Q. I see, and does he have a regular base at Martin? A. Air Force advisor people are stationed at Martin. They fall under the Headquarters of, or under a unit located at 14th Air Force.

Q. How many people were maintained at Martin? A. At that time there were four.

Q. Four. That was Major Britton. Who else? A. Major Britton and three sergeants. Sergeant Baldwin, Storm and Hoffman.

Q. One was Maintenance Sergeant. What were 592 the duties of the other sergeants? A. One was administration and personnel and the third was support of the limited forecasting flight. He was Air Force observer, weather station.

Q. Could you give us their names so we can get a complete record of their names, please? A. I'm sorry. I don't know their first names.

Q. Okay. That's all right. You mentioned a maintenance sergeant. Does he physically look over the aircraft? A. Under Major Britton's direction he does.

Q. And does he also examine all the maintenance and inspection records pertaining to the aircraft? A. You used the word "all". I wouldn't necessarily say all. He can make spot checks of the maintenance records.

Q. Then you say there is another sergeant that has to do with personnel? A. Administration and personnel.

Q. Administration and personnel. Now, just what does he do? A. He assists the unit in—well, various capacities.

593 Keeping up with the numerous administrative procedures that we are required to keep up with by regulation. If there is any question of interpretation of how to fill out various forms, and what-not. He also conducts the qualification testing, which is a function of the Air advisor's office to receive the tests and properly

safeguard them and administer them for AFSC qualification.

Q. When you refer to initials I would appreciate your also telling us in each case what it means. A. Air Force Specialty Code.

Q. Well, Colonel, is it correct to say that whenever any person or individual applies for employment as a civilian employee in the Air National Guard or applies for membership in the Air National Guard itself that that is reviewed and first passed upon by the Air Force advisor before the application is accepted? A. No, that is not true.

Q. All right. Now just tell me what part the Air advisor plays in the qualification or acceptance of an employee or a member of the Air National Guard. A. You have two questions there. The employees are examined at the base and are hired by direction of the Adjutant General.

594 The procedure is that we examine an individual for employment and then if he meets the qualifications the Adjutant General is so notified and if he concurs he will cut orders hiring this individual against the demanding document that we are authorized. Now, the military end of it—

Q. Before you get to the military end of it may I ask you this. At any stage do the application papers go across the desk of the Air Force advisor, or he or his staff in any way consulted? A. No. That is not one of their functions.

Q. I see. Now, let's go to the military side. A. The AFSC testing program that I was speaking about that the Air Force, the Air Advisor's office monitors is not an entrance examination. There are tests given to the airmen who desire to get into the organization and if they qualify they are enlisted as airmen into the unit, based on the qualification testing score and also the TO vacancy. Now these orders are a function of the State and—

MR. MUDD: For the record in this connection you are

using TO not as technical order but as table of
 595 organization?

THE WITNESS: Table of organization, yes, I'm sorry. Now, an officer coming into the unit, if he is an Air Force Reserve Officer he makes application and if he meets the qualification he receives an appointment in the unit and his paper work and what-not is sent to the National Guard Bureau for Federal recognition of his position and as such he becomes a member of the Air National Guard of the United States.

Now, the National Guard Bureau can either grant or withhold this recognition, based upon the qualifications that are listed in his record and his previous service.

Q. I see. So that— A. The Air Force advisor's office does not do this.

Q. So that his acceptance is subject to ultimate approval by the Air National Guard Bureau, is that right? A. His Federal recognition, which grants him a military, a Federal status—

Q. Yes. A. —is a function of the National Guard Bureau and I understand the Department of the Air Force.

596 Q. Well, all the members of your Air National Guard Bureau are Federally recognized, are they not? A. Of the Bureau?

Q. I mean of the Maryland Air National Guard. A. That's true. We have in the State a Federally recognized unit and, as such, our personnel have to be Federally recognized.

Q. All right. That means that they are all approved by the Air National Guard Bureau? A. Yes.

Q. All right, and does that also apply to promotions? Do promotions all have to be approved by the— A. That's true, yes.

Q. Now, who grants sick leave of personnel? A. Sick leave is granted by order of the Adjutant General and is strictly an administrative function. The base determines the requirement and administers it and the Adjutant General cuts orders on all leave, all changes of status.

Q. Are civilian employees or military personnel of the Air National Guard permitted to engage in political activities? A. You have two questions again, 597 Mr. Wolcott. If you would ask them separately—

Q. What about civilian employees? Let's limit it to civilian employees. A. It is my belief that civilian employees are governed by the provisions of the Hatch Act that would prohibit us from seeking public office or engaging in political activities, but I don't believe that applies to the ordinary member of the unit that is not a full-time employee.

Q. What provisions are made for compensation for injury or death while in performance of duties as Air Technicians? A. We are governed under the provisions of the Federal Employees Compensation Act for injury and are so treated at the United States Public Health Hospital in Baltimore.

Q. Is there a special regulation bringing you under that, or is that because you are Federal employees? A. I am not familiar why we are under the regulation. I think it is beyond my knowledge. I merely know that the regulation applies, and we comply with the provisions of it.

598 Q. Well, Colonel, did you, in connection with the injuries suffered by Captain McCoy in this accident, make an application on his behalf for compensation from the United States Government? A. I filled out an application for his admittance into the hospital for medical treatment.

Q. What hospital was that? A. The U. S. Public Health Service Hospital in Baltimore.

Q. Well, is that limited to Federal employees? A. I'm sorry. I don't know who it is limited to. I know that Merchant Marine personnel are covered there, but just who they treat I don't know.

Q. Well, on what basis did you apply to that hospital? A. Under the provisions of the Federal Employees Compensation Act.

Q. Did you also fill out a request for treatment of injury of Captain McCoy under the United States Employees Compensation Act?

MR. MUDD: Different than what you just referred to?

MR. WOLCOTT: Yes. Incidentally, I have a paper 599 here. I am not trying to trap you or—

MR. MUDD: I didn't mean to imply that. I was just trying to keep it straight.

MR. WOLCOTT: Yes, different from the one that he mentioned.

I have handed Colonel Kilkowski a group of papers which have previously been marked Plaintiffs' Exhibit No. 2. I think that is a question.

THE WITNESS: The answer is yes.

By MR. WOLCOTT:

Q. Who is Colonel, is it Ebaugh? A. Ebaugh, E-b-a-u-g-h.

Q. Yes. Who is he? A. He is the U. S. Property and Fiscal Officer for the State of Maryland.

Q. Now I show you a certificate dated May 29, 1958 which is a part of Plaintiffs' Exhibit 2 and ask you if you have seen this or a copy, or the original thereof before?

A. I can't recall having seen it.

Q. Well, do you recall whether you were consulted on the drafting of this certificate which states that, over Colonel Ebaugh's signature, that Julius McCoy was 600 working as a civilian employee of the United States at the time of the injury. Were you consulted in connection with that? A. I can't recall whether I was or not.

Q. Well, normally would you be consulted? A. You are asking if I would be normally consulted about something that is not normal.

Q. Well, where there is an application for compensation for injury are you normally consulted in the filling out of the forms by various officers and members of your unit?

A. We ordinarily send these forms through the U. S. Property and Fiscal Officer.

Q. Where is he located? A. At Havre de Grace.

Q. Maryland? A. Maryland.

Q. Now where is Colonel Ebaugh stationed? A. At Havre de Grace.

Q. Oh, I see. So they are all together there at Havre de Grace? A. Colonel Ebaugh is the United States Property and Fiscal Officer who is located at Havre de Grace, Maryland.

601 MR. MUDD: Is that the Aberdeen Base?

THE WITNESS: No. It is at the Maryland National Guard installation at Havre de Grace. It is the old race track.

By MR. WOLCOTT:

Q. Now, in making an application for compensation for injuries is it necessary and is it the procedure that the injured party be certified as a civilian employee of the United States at the time of the injury? A. At my level, no.

Q. Well, at any level. At Captain McCoy's level? A. No. If Captain McCoy receives an injury the procedure is that he gives notice to the Base Detachment Commander that he has been so injured.

Q. Yes. A. And we, from our administrative section, fill out the appropriate forms for his correction of his difficulty.

Q. And what forms do you, in your administrative section, fill out? A. Well, there is CA-1, CA-2, CA-16.

Q. Well, if you give me designation numbers they mean very little to me. Tell me what the forms are. A. 602 There is the employee's notice of injury that is turned in by the injured employee to the base.

Q. Is that a notice of injury under the Federal Employees Compensation Act? A. That's true.

Q. And where is that form obtained from? A. It is obtained from our Headquarters.

Q. I see. All right. Go ahead. What else? A. Then the official superior's report of injury.

Q. And is that a notice under the—or report under the Federal Employees Compensation Act? Is that one of the forms? A. It is one of the forms for administration under the Act, yes.

Q. Thank you. Go ahead. A. Then there is the request for treatment of the injured under the U. S. Employees Compensation Act.

Q. And is that one of the forms under the Act, the Compensation Act? A. Yes.

Q. All right. What else? Now, is it further necessary as part of the administrative handling of the claim that he be certified as a Federal employee? A. I do not certify to that.

Q. But that the Bureau, that someone in the Bureau certifies him as a Federal employee? A. I do not know.

Q. But you do know that in this case he was certified as a Federal employee. Is that correct, sir? A. You are showing me a certificate apparently signed by Colonel Ebaugh, U.S.P. & F. O. which so certifies. It is not my function to interpret law.

(Thereupon, the luncheon recess was taken from 1 o'clock to 2:15 o'clock p. m.)

AFTER RECESS

By MR. WOLCOTT:

Q. Does your office maintain a full set of forms for applications for compensation? A. Yes.

Q. That is the Federal Compensation Board, is that right? A. Yes, sir.

604 MR. WOLCOTT: Will you mark this exhibit, please?

(Document dated 6 November 1957, Letter Orders, was marked Passenger's Exhibit No. 13 for identification.)

By MR. WOLCOTT:

Q. Could you look at that exhibit, Colonel, and I ask what type of duty on the part of Captain McCoy that re-

fers to? A. It refers to duty performed by Captain McCoy for the purpose of ferrying a F-86E aircraft.

Q. Now, what was his status while ferrying this aircraft, and by the way, from what points was this ferry to be accomplished—between what points? A. From Martin Airport, Baltimore, to Van Nuys Municipal Airport, Van Nuys, California.

Q. Now, what was his status while performing the ferry? A. To act as a pilot, to perform the ferry duty. He was ordered to active duty, voluntarily, and with consent of the Governor.

Q. Then he performs this ferry job as a member of the U. S. Air Force, is that right? In other words, was 605 he in civilian status or military status? A. He was in a military status.

Q. And with respect to his military status was he a member of the U. S. Air Force? A. From the order I couldn't rightly say that he was a member of the U. S. Air Force. He was on active duty for the purpose of ferrying an aircraft from Martin Airport to Van Nuys, California, and this is a type of duty in support of the active establishment.

Q. Now, that is an order issued by the Department of the Air Force, is that right? A. Order issued by the Departments of the Army and Air Force, National Guard Bureau, Washington 25, D. C., and attested to by Colonel Cassell, Assistant to the Adjutant General, State of Maryland.

Q. Well, now, under the terms of that order is he relieved of his status as member of the Air National Guard? A. Yes. The order states he is relieved from his Air National Guard assignment prior to the effective date of his active duty to do this ferrying job.

Q. But he is assigned to Headquarters, U. S. Air 606 Force, as a part of the Air Force, is he not, under that order? A. That designates his assignment to Headquarters, U. S. Air Force. I couldn't be justified

in saying whether he was a member of the Air Force at that time. I think that would have to come from higher authority than me.

Q. I see. Now, let me ask you this. Having in mind this type of order, Passenger's Exhibit 13, during a period, say, of the time that you were with the unit, the Maryland Air National Guard unit, had there been similar orders of that type issued with reference to members of the Air National Guard? A. Yes.

Q. Are they fairly frequent? A. This type of order is issued generally when an aircraft has to be delivered from point to point. It is issued in accordance with—I don't know the exact number of the regulation, but I believe it is ANGR—55-08.

Q. So could you fairly say that they are frequent? A. Your use of the word "frequent", I might better explain when it would be used and let you determine.

Q. Well, you have already told us when it is used,
607 Captain, I mean Colonel, but what I want to find out is how often it is used. A. Well, if we don't receive a change of aircraft in the future it would be used rather infrequently, but we have 25 aircraft and if we were to change aircraft and have to move these aircraft out the order would be used 25 times in this case.

Q. But aircraft are replaced from time to time, is that right, sir? A. That is the purpose of this order here. This is a F-86E aircraft which was being replaced by an F-86H and we were instructed to deliver these to a new base and I might add that this order 6 November 1957 predates my association with the unit. At this time I was at Harbor Field and Commander of the 135th Air Resupply Group at this time.

Q. Well, I am talking now about the procedure. Now is that the procedure that is usually followed in connection with ferrying aircraft, that the status of the Air National Guard Officer reverts to Air Force status? A. At the present time I believe the correct terminology is active duty, Federal.

608 Q. But at that time. I am talking about prior to May 20, 1958. A. I couldn't be sure.

Q. Is that the type of order that was usually cut in connection with ferrying aircraft? A. Yes, sir, it is.

MR. PETTIBONE: Can we see the order, please, Mr. Wolcott?

MR. WOLCOTT: That was one of the papers that was produced by the Government in connection with the order for production of papers in the Morgan case. Major Prince is familiar with that and, incidentally, while we are at it, I am going to request a stipulation from the Government, Mr. Pettibone, to the effect that all papers which were produced by the Government in the Morgan case be deemed to have been produced in all of the cases that are titled in this deposition so we don't have to go through a formality of taking each one and marking it in all the cases.

MR. PETTIBONE: Well, can you do that? Can you so stipulate in cases where you are not counsel yourself?

MR. WOLCOTT: Well, I am requesting it in all cases
609 in which I am counsel and I imagine that Mr. Kieffer is going to request it in cases in which his firm is counsel.

MR. KIEFFER: And Mr. Davidson from Chicago.

MR. WOLCOTT: And, of course, Davidson. Well, that applies to the Gliedman matter, because I am counsel in there.

MR. PETTIBONE: We can do that all right. We will do it. Of course, I was just wondering what was the best procedure.

MR. WOLCOTT: Well, I think we stipulate right here. There is a record and all the cases are titled here so that this is as good a place to do it as any.

MR. PETTIBONE: You are referring now to only those documents and papers which were turned over to you as counsel for the plaintiff in the Morgan case in the Eastern District of Brooklyn.

MR. WOLCOTT: That's right.

MR. PETTIBONE: In response to your motion to produce.

MR. WOLCOTT: That's right.

MR. PETTIBONE: All right. The United States will so stipulate.

610

By MR. WOLCOTT:

Q. I show you this paper which is one of those produced by the United States Government in the Morgan case and I ask you to identify it, please.

MR. PETTIBONE: Do you want to mark it?

MR. WOLCOTT: I will mark it, yes.

(Documents were marked Passenger Exhibits 14-A, B and C.)

MR. MUDD: Do you have extra copies of the papers you are now offering?

MR. WOLCOTT: No, I don't. The government has it. You can get it from the Government, Mr. Mudd. I was just furnished with this copy.

MR. PETTIBONE: What is it, by the way?

MR. MUDD: USAF Officer's Effectiveness Report.

By MR. WOLCOTT:

Q. Could you tell us what these are? Identify them, please. I am talking about the typed report now, not what is in them. A. This is the Air Force Form 77, U. S. Officer's Effectiveness Report. There appear to be three copies of this, or three different reports; titles changed here (indicating).

611 Q. By "USAF Officer", does that mean United States Air Force Officer? A. United States Air Force Officer Effectiveness Report.

Q. All right. I notice that all of these are signed by Edwin Warfield. Is that name familiar to you? A. Colonel Warfield is the now—is the Chief of Staff of the Maryland Air National Guard.

Q. During the period January 25th to August 30th, 1953,

was Captain McCoy a member of the 104th Fighter Squadron? A. Yes, sir.

Q. And during the period June 27, '54 to July 23, '55, was he a member of the 104th Fighter Interceptor Squadron? A. Yes, he was.

Q. And during the period August 9, 1953 to June 26, 1954 was he a member of this Squadron? A. Yes, sir.

Q. Now, who is Stanley Sanders or Saunders? A. Major Saunders was formerly Base Detachment Commander of the Harbor Field installation and at one point in time was Operations Officer of the 104th Fighter Squadron.

612 Q. What is the purpose of these effectiveness reports, and who makes them, and where are they sent? A. The effectiveness reports are filled out at unit level and sent forward in three copies. In the case of Air National Guard Officers the one copy is retained in the Adjutant General's office, one is sent to the National Guard Bureau. The other is retained at Headquarters, U. S. Air Force.

Q. Well, this form, Effectiveness USAF Officer Effectiveness Report, is an Air Force Form, is it not? A. Yes, sir.

Q. And pursuant to what regulation is that form filled out and sent? A. I don't know the exact number.

Q. Well, what series? Is it Air Force, or what? A. I don't recall the series. I believe it is governed by Air Force Regulations.

Q. Are you familiar with the Federal Employees Regulations contained in the Federal Personnel Manual? A. I might not know the title, the manual by that name.

613 Q. Well, I am referring to the Federal Personnel Manual, the S658. Does that mean anything to you? A. No, sir, it doesn't.

Q. Well, you take a look at this manual and see whether you can identify it. A. I am not familiar with this manual. The manual for governing of our Air Technicians employed is Air National Guard Manual 40-01.

Q. Well, are you familiar—have you at any time concerned yourself with the Federal Employees Regulations?

MR. MUDD: Is that a given number regulation you are speaking of, or a series, Mr. Wolcott?

MR. WOLCOTT: I think it is a general category, Mr. Mudd.

THE WITNESS: No, sir. The regulations for our use are the ANGR Regulations in the 40 series which govern civilian personnel.

Q. Now, prior to this accident, Colonel, how many operations did you have weekly in your squadron? A. As near as I can remember, approximately 100. Mr. Wolcott has refreshed my memory through information
614 previously given at another hearing where it was shown that an examination of the record showed that there was 75 flights per week.

Q. I think you checked your record actually and furnished that information. A. That is true.

Q. Now, what proportion of this takes place on weekend and what proportion takes place on week days?

MR. MUDD: Excuse me. What period of time are we referring to now, Mr. Wolcott?

MR. WOLCOTT: I am referring to time before May 20, 1958.

MR. MUDD: Would you say within, say, a six month period before?

MR. WOLCOTT: Well, Colonel Kilkowski checked the records, and let him furnish the period of time.

MR. MUDD: Well, then I think it is fair to ask him—

MR. WOLCOTT: Now just a minute, Mr. Mudd.

MR. MUDD: All right. Then I am going to object to the question.

615 MR. WOLCOTT: I gave him complete information.

This is ridiculous. Well, you go ahead and object.

MR. MUDD: And I am going to instruct him not to answer.

MR. WOLCOTT: We will go right down to Court and find out whether he can answer. I gave him all the information.

MR. MUDD: I am asking you to let the witness know what

period of time you are talking about, or to let him refresh his memory.

MR. WOLCOTT: Look. If I go out of my way to supply the information you don't like it.

MR. MUDD: Of course I do.

MR. WOLCOTT: All right. Now that is exactly what I did here and you are just making it difficult.

MR. MUDD: Just a minute now. You just keep quiet, Colonel, until we get this straightened out.

MR. WOLCOTT: We will go down to Court and straighten it out, if you'd like to.

MR. MUDD: All right. If you'd like to go right now we will go right now. It is up to you.

MR. WOLCOTT: Well, a couple of questions and
616 then if I don't get a satisfactory answer then we will go.

By MR. WOLCOTT:

Q. Now, Colonel, I showed you a transcript of testimony you gave on a hearing before a subcommittee of the Committee on Government Operations in the House of Representatives. Is that right, sir? A. That is true.

Q. All right. Now, were you asked there to obtain certain information with respect to the number of operations that you made weekly, your Squadron, and the number of weekends and the number of week days? A. That's true.

Q. All right. Now, did you cover any particular period of time in compiling that information?

MR. MUDD: You refresh your memory by looking at that.

By MR. WOLCOTT:

Q. I ask you in compiling the information what period of time you covered.

MR. PETTIBONE: In view of the fact the witness is apparently going to refresh his recollection from a printed document that he has been handed I'd like the record to disclose what the document is.

617 MR. WOLCOTT: I just read it. The record discloses it.

MR. PETTIBONE: Is that the record you read?

MR. WOLCOTT: Yes.

MR. PETTIBONE: I'm sorry.

THE WITNESS: In the hearing in the committee on Federal role in aviation the question was asked of our flights per week. We told them it was approximately a hundred hours per week and 50 percent were on weekends and 50 percent during the week. They asked us to furnish accurate records for the period 1 January—

MR. MUDD: All right.

THE WITNESS: —through May 22, 1958, which we subsequently supplied and it turned out that there had been an average of 75 flights per week and that 49 percent of these flights were made on weekends and 51 percent during week days, and Saturday and Sundays were considered weekends.

MR. WOLCOTT: Thank you.

By MR. WOLCOTT:

Q. With respect to your job in civilian capacity did you come under any Civil Service Rules or Regulations?

618 A. To my knowledge, no.

Q. In your Civil Service capacity I think you testified that you are prohibited from engaging in political activities. Is that right, sir? A. To the best of my knowledge the Hatch Act does apply to our employees.

Q. Well, is that in connection with your Civil Service status? A. We do not have a Civil Service status, Mr. Wolcott. I said my understanding was that the Hatch Act applies to us in our employment as Air Technicians.

Q. You mean as Federal employees, is that it? A. As Air Technicians. We are employed as Air Technicians. It is a description given in the regulation and it is the only description that I can give you.

Q. Colonel, is there any regulation governing the amount of reserve fuel a flight must have on a local VFR flight?

I am talking as of the time of May 20, 1958. A. Yes, sir.

Q. And what regulation is that?

MR. MUDD: Is that, or was that?

619 MR. WOLCOTT: Was that. Thank you.

THE WITNESS: I believe it is 60-16.

By MR. WOLCOTT:

Q. Is that an Air Force—is that Air Force? A. Air Force Regulation 60-16. I might add we had supplemented that with our local SOP at Martin requiring in the T-33 aircraft 100 pounds—100 pounds of fuel on initial approach for landing and 1000 pounds in the F-86H.

Q. Well, that, Colonel, is an additional requirement and does not— A. This is more stringent than the Air Force Requirement that we had put on locally.

Q. It doesn't supplant the Air Force Requirement, but it is in addition to it and makes it more stringent? A. Yes, sir.

Q. Thank you. Were Sergeants Nolan, Thomas, and Feidler, civilian personnel at the base? A. They are hired as Air Technicians and were at the time of the accident.

Q. You said they are technicians and they were deemed civilian personnel, is that right? A. They were full-
620 time employees, air technicians; civilian personnel.

Use the terminology you wish. They were full-time employees of the Maryland Air National Guard at the time.

Q. And they were in the civilian personnel category? A. Yes.

MR. WOLCOTT: That's all. Your witness, Mr. Pettibone.

MR. PETTIBONE: Thank you, Mr. Wolcott.

MR. WOLCOTT: I'd just like to ask one question.

MR. PETTIBONE: Certainly.

By MR. WOLCOTT:

Q. Colonel, was Captain McCoy suspended from flight duty at any time?

MR. MUDD: Objection, unless the question is directed to a specific time before the accident.

By MR. WOLCOTT:

Q. Was he suspended from flight duty at any time before the accident that you know of? A. To my knowledge, no.

Q. Was he suspended from flight duty at any time after the accident?

MR. MUDD: Objection.

621 MR. WOLCOTT: Will you answer that, please?

MR. MUDD: Go ahead and answer it.

THE WITNESS: As a result of the accident, well—yes, I should say, but—if that is satisfactory.

By MR. WOLCOTT:

Q. Well, you started to say "as a result of the accident".

MR. MUDD: Well, he has answered the question.

MR. WOLCOTT: I know.

By MR. WOLCOTT:

Q. Now was that as a result of the accident, Colonel?

MR. MUDD: Objection. Same is immaterial.

MR. WOLCOTT: All right. Will you answer that, please?

THE WITNESS: Captain McCoy was relieved of his responsibility for flight duty because of injuries that he received in the accident and has never returned to flight duty. His injuries, which took quite a long time to heal, particularly his hands, prevented him from flying duty for a considerable period of time and subsequently to that he has requested voluntary release from flying duty, which the Air

Force has granted and through their order has been
622 released from flying status.

By MR. WOLCOTT:

Q. Did you or any officer in your unit have any conference with Captain McCoy with respect to his fitness, apart from physical, for flying duty?

MR. MUDD: Is this subsequent to the accident?

MR. WOLCOTT: Yes. I am talking now about his suspension from flying duty.

MR. MUDD: I object and instruct the witness not to answer that.

MR. WOLCOTT: On what ground?

MR. MUDD: Completely immaterial.

MR. WOLCOTT: That is no ground.

MR. MUDD: It has no relevancy and is prejudicial to Captain McCoy.

MR. WOLCOTT: It is up to the Court whether it wants to admit that. That is no objection.

MR. MUDD: In my opinion it is, Mr. Wolcott.

MR. WOLCOTT: Do you still persist in that?

MR. MUDD: That's correct.

MR. WOLCOTT: I see.

By MR. WOLCOTT:

Q. Has the National Guard Bureau issued any
623 recommendation or directive with respect to his fitness
to resume flying? A. There was no recommendations
from National Guard Bureau nor the Air Force.

Q. Nor from the Air Force? A. To my knowledge, no.

Q. Was there any recommendation from any Government
source?

MR. MUDD: Objection. Just a minute, Colonel. I am going to instruct the Colonel not to answer that. He has explained the reason why Captain McCoy is not flying today and I think that is sufficient, and I don't even think that part of it is material to any relevant issue in this case and any answer given in any further elaboration may or may not be prejudicial to Captain McCoy and I, therefore, instruct the Colonel not to answer.

MR. WOLCOTT: Well, I am asking the question, Mr. Mudd.

MR. MUDD: I understand.

MR. WOLCOTT: To find out whether any agency of the
Government—

624 MR. MUDD: I understand.

MR. WOLCOTT: —had anything to do with the fact that Captain McCoy is no longer on flying duty.

MR. MUDD: I know your question has—

MR. WOLCOTT: That has nothing to do with Captain McCoy personally.

MR. MUDD: —has a purpose over and above the personality of Captain McCoy. I understand the reason for the question. I think you understand the reason for my instruction to the witness.

MR. WOLCOTT: Yes, I do. Well, I understand the reason. I can't say that I agree with it, but I understand it.

MR. MUDD: I wouldn't expect you to, but I have got to stand on that. I know why you want it.

MR. WOLCOTT: All right. That's all.

EXAMINATION BY MR. PETTIBONE.

Q. Colonel Kilkowski, I believe you testified that on May 20, 1958 you had a dual status in connection with the 104th Fighter Squadron. In one capacity you were the Detachment Commander and in the other capacity you were
625 an Air Technician employed as a Base Detachment Commander, is that correct? A. Yes, sir.

Q. Now referring first to the prior, the first of those two categories. You held the position of Detachment Commanding Officer by virtue of your rank in the Maryland Air National Guard; that is, your rank of Lieutenant Colonel, is that correct? A. No, sir. You referred to the first, but then you said the second.

Q. Oh, did-I? I'm sorry.

MAJOR PRINCE: It was misstated from the beginning.

THE WITNESS: If you will correct the question.

MR. PETTIBONE: Let me withdraw the whole question and start over.

By MR. PETTIBONE:

Q. Were you designated Commanding Officer of the Department by virtue of the fact that you were the senior officer in rank in the unit? A. No, sir. I was designated the Base Detachment Commander by virtue of my selection of the Adjutant General of the State of Maryland to

not—with any connection with the 104th Fighter Squadron, but by virtue of being the head of the entire base there.

Q. Yes. Now you used the term Base Detachment Commander. That also is the same title that refers to your employment as an Air Technician? A. That is the only title, yes.

Q. That is the only title. Is the title the same in your other capacity; that is your military capacity at that time and on that day? A. No, sir.

Q. Or can we use a different term to differentiate? A. The term in the military title was Commanding Officer of the 104th Fighter Interceptor Squadron.

Q. Yes. That is what I am getting at. All right. Now, as Commanding Officer of the 104th, was it called Fighter Interceptor Squadron at that time? I am only referring to this one day now. As Commanding Officer were you the senior officer— A. Yes, sir.

Q. —in the unit on that day? A. Yes, sir.

627 Q. Was Captain McCoy one of the other officers of the Maryland Air National Guard assigned to the unit in question in the Squadron on that day? A. Yes, sir, he was.

Q. How many officers were there assigned to the Squadron on that day; I am talking about military officers holding military rank in the Maryland Air National Guard like you and Captain McCoy. A. I can only give it to you approximately.

Q. Well, that will be all right, approximately. A. Forty-five to fifty.

Q. Some of those officers, some of those forty-five or fifty officers were pilots or had flying status? A. Yes, sir.

Q. You had such a flying status? A. Yes, sir.

Q. And so did Captain McCoy? A. Yes, sir.

Q. How many—approximately, at least how many of the others held a flying status? A. Approximately thirty-five.

628 Q. Now, did all of the officers who held, of the approximately thirty-five officers who had flying status prior to May 20, 1958, perform training proficiency flights from time to time with aircraft assigned to the Squadron? A. Yes, sir, all of them.

Q. Now, Captain McCoy, as such an officer, was also employed as an Air Technician by the Squadron, as we all know. That is correct, is it not? A. No, sir. He is not employed by the Squadron. He is employed by the Military Department of the State of Maryland.

Q. Well, all right. Then he is employed by the Military Department of the State of Maryland. Were some of the other officers—well, you yourself also were employed as an air technician by the military department of the State of Maryland on that day too? A. Yes, sir.

Q. And had been prior to that? A. (Nods head affirmatively.)

Q. Now, were some of the other officers who had flying status likewise employed by the military department
629 of the State of Maryland as Air Technicians assigned to this Squadron on that day? A. Yes, sir.

Q. About how many? Can you tell us? A. Approximately six, to the best of my knowledge.

Q. All right. So there must have been approximately 29 others then who were officers then on flying status but were not employed as air technicians, approximately 29? A. Approximately, yes, sir.

Q. Now, on May 20, 1958 you authorized Captain McCoy to make a training proficiency flight of approximately one hour's duration? A. Yes, sir.

Q. Prior to May 20, 1958, had you authorized the approximately five other officers who were employed as air technicians to make similar training proficiency flights of approximately the same duration, or similar proficiency training flights? A. Had taken proficiency flights, and other types of flights, too.

Q. Yes, and with respect to the approximately 29 630 officers who were not employed as air technicians had you authorized them also to make proficiency training flights similar to the one made by Captain McCoy on May 20, 1958? A. Yes, sir.

Q. Was there any requirement that in order to make a training proficiency flight one had to be employed as an air technician? A. In the Squadron in general, no.

Q. Now, referring to your other capacity on May 20, 1958; you yourself were employed as an air technician under a job title which has been referred to here as Base Detachment Commander. Did you perform the duties described under a position labeled Base Detachment Commander, as set forth in Air National Guard Manual 40-01, on page 23 thereof. I will show you. It is dated March 1, 1958, and job title at the top in large letters is stated to be Base Detachment Commander. The job number is 00-00; or 00-01, or 00-02. To assist you in answering this question I will hand you a copy of the manual and the page which I referred to, which you can look at before you answer it.

MR. WOLCOTT: I ask that that volume be marked 631 for identification, please. That doesn't mean he is going to retain it, just to mark. I'd like that marked.

MR. PETTIBONE: Well, that's all right with me.

(Manual was marked United States Exhibit No. 11 for identification.)

MR. WOLCOTT: Does that also say on Exhibit 11 on the cover, Department of Air Force, National Guard Bureau. That is stated on there, and across the middle of it, Civilian Personnel Manual, and there is a seal, Department of the Army and Air Force, National Guard Bureau, 1 March 1958. Is that right, Mr. Pettibone?

MR. PETTIBONE: Yes, that's right.

There is a question before you. Do you recall it, Colonel

Kilkowski, after all this time, or shall we have it read to you now?

THE WITNESS: Yes, sir.

MR. PETTIBONE: That is your answer?

THE WITNESS: That is the answer to the question. I'm sorry.

MR. PETTIBONE: May I have that manual back, please?

632 By MR. PETTIBONE:

Q. Who had actually employed you to fill this position? Do you remember the name of the person who actually employed you? You previously said the Adjutant General of the State of Maryland. Did he do it individually, or did someone by designation do it for him? A. I was recommended for the position by the Chief of Staff, Maryland Air National Guard, and the Adjutant General actually approved it and cut the orders.

Q. All right. Do you remember who the Chief of Staff was at that time? A. Colonel Warfield.

Q. Now, one of the air technician employees who you supervised in this position was Captain McCoy. A. Yes, sir.

Q. Had you recommended him for employment in his air technician position, or had someone else done that? A. Someone else had, apparently. He was—I might explain. He was not hired while I was the Base Detachment Commander of the unit.

Q. You mean he had been employed prior to the time when you became Base Department Commander?

633 A. No, sir. At the time of his employment I was an operations officer of the unit, not Base Detachment Commander.

Q. Well, then you subsequently became Base Detachment Commander? A. Yes, sir.

Q. So that actually he was employed in air technician status before you became the Base Detachment Commander? A. Yes, sir.

Q. So that when you did take over as Base Detachment Commander in this position he was one of a number of employees regularly employed there at that time? A. Yes, sir.

Q. About how many employees in all did you supervise in this position, approximately? A. The authorization is for 119 under me, or 120 total.

Q. But only a few of those, I take it, worked at aircraft maintenance duties of one kind or another, or things related thereto? A. No, sir. A good portion of them worked in aircraft maintenance duty.

Q. Oh, many of them do. About how many would
634 you say? A. This is an approximation, but approximately seventy. Excuse me. I should correct that. Aircraft maintenance is approximately 57. There are other associated maintenance fields which is hard to divorce from aircraft maintenance, such as motor vehicle, armament, and what-not, but the direct aircraft maintenance field is approximately 57.

Q. I see. In other words, the maintenance group generally, as you described it, would be the largest single group of your employees? A. Yes, sir.

Q. Now, as Base Detachment Commander did you establish the working hours for these other employees and particularly the maintenance technicians? A. The working hours are established by the Adjutant General and as the Base Detachment Commander I am obligated to carry those out and also make any recommendations for changes.

Q. Well, does the Adjutant General of the State of Maryland state what days people will work and what hours they will come to work, and that sort of thing, or did you do that? A. As a matter of administration
635 I do that as Base Detachment Commander.

Q. Yes. In other words, the Adjutant General of Maryland prescribes in general the work week? A. Yes, sir.

Q. And then the actual details of how it is carried out will be a matter for your administration? A. That's true.

Q. Now, as part of your supervisory responsibility in that manner did you cause time and attendance records to be kept— A. Yes, sir.

Q. —of the employees? A. Yes, sir.

Q. Describe briefly and in a general way the nature or kind of records which you kept that related to the time and attendance for work purposes of the air technicians assigned to the Squadron. A. We have the roll of the air technicians assigned, which is maintained in our administration. The personnel report for work. The large majority of the people, other than the officers, stand
636 a formal roll call and the officers—

Q. You mean they stand formal roll call at a certain hour in the morning, as when they came to work. Is that what you mean? A. Yes, sir, roll is at five minutes to eight.

Q. What do you do? Line them all up? A. No, sir. We have—everyone reports to the large meeting room. They are seated until the roll call and then any general announcements of the day are given to them at that time.

Q. I see. That applies to all other than those who also happen to be commissioned officers? A. The commissioned officers roll is taken separately. We do not require that they stand roll call. They are chargeable with their attendance by the person who keeps the roll. There are so few of them, he checks very quickly whether they are present.

Q. Actually though I think you said before there were six of them, did you not? A. All told we have approximately—the time in question I think there were, all told,
eight officers.

637 Q. Of whom you yourself were one? A. Yes, sir.

Q. Did you keep the same time and attendance records, the same general kind of records for the officers, the same as the non-officers? A. Yes, sir, identical.

Q. Would the record on any individual show whether he had worked on any given day? In other words, were these records kept on a weekly basis, or a monthly basis, perhaps? A. Kept on a—over a payroll period.

Q. On a bi-weekly basis, in other words? A. At that time it was a bi-monthly—semi-monthly.

Q. Semi-monthly? A. At the present time it has since been changed and it is a bi-weekly basis.

Q. Well, then, you could inspect your records at any time for any given individual with respect to any given day to ascertain whether or not he had worked on that day, could you not? A. Yes, sir.

Q. And would the record also disclose how many
638 hours he worked on that day? A. Yes, sir.

Q. Did the air technicians employed in the unit have to work a certain number of hours per week? Was it computed on an hourly basis? A. Generally computed on requirement to work forty hours per week. There are times when things occur which would require a greater period of time and compensatory time off for the time that they put in the greater period of time. Emergencies that might occur; other things, such as we have right now. We have a TO modification that requires that we work 24 hours a day in order to accomplish this emergency TO on the aircraft, so we have to make adjustments in the work week periodically to take care of these things; but normally if there is no outstanding emergency the work week is Tuesday through Saturday and altered if we have a training assembly on the Saturday that people will work the following Sunday or Monday to make up for that time.

Q. Did it ever happen that any of the air technicians employed by the Squadron during normal working hours for the performance of their air technician job duties
639 used some of the time on a day to perform military duties in connection with their status in the Maryland Air National Guard? A. Yes, sir.

Q. And how did you mark their time and attendance records when such things as that happened? A. There are two authorized ways of getting, performing, as you say, additional military duty, which I refer to as flying training periods right now.

Q. Yes, All right. A. Or active duty, such as Mr. Wolcott—

Q. Yes. A. —or any other duty that requires that you not be paid the dual status. The individual has to go on annual leave or to be working on compensatory time basis where they, as an example, let us suppose an individual is scheduled for evening work that we have to do in order to support our evening flying operations. Well, locally his work schedule would be altered from perhaps one o'clock in the afternoon until nine in the evening to support those flying schedules. There is nothing to preclude his coming down at that time and on his own time and avail himself of a flying training period, which is a four-hour
640 period. The only provisions is that you cannot be present for both duties at the same time, can't be present for air technician duty and be in a pay status in a military one too.

Q. In other words, at any given moment you have to be in either one status or the other, but you can't be in both of them at the same moment? A. You can be in both of them at the same moment.

Q. Well—

MR. WOLCOTT: Please. Just a minute. Let him answer the question.

MR. PETTIBONE: All right. Go ahead. I didn't mean to cut you off.

THE WITNESS: At the time of field training you get what is known as fifteen days military leave where you are being paid from both sources.

By MR. PETTIBONE:

Q. Yes. That is what I was about to interrupt you to inquire. Now, let's take a proficiency training flight of one hour's duration to be made during the course of a normal work day for an air technician. Supposing he decides to make a proficiency training flight for one
641 hour commencing at ten o'clock in the morning on a work day and you authorize and approve it as a

proficiency training flight and then he goes and makes the proficiency training flight for one hour. How do you mark his time and attendance records with respect to that hour in connection with his employment as an air technician? A. Well, if he were flying in an air technician status his time and attendance would be marked present. Now, if he were availing himself of the flying training period that is authorized he would either have to work the four hours or go on a leave status for that period of time. The flying the aircraft doesn't have anything to do with the status that he is in. The individual flies the aircraft by virtue of the orders that he has been given and he can fly the aircraft in many statuses, five to be exact, and this has no bearing on any record that is kept as far as flying time is concerned, if he—

Q. No, I am not.—

MR. WOLCOTT: Please. Please let him finish his answer, and then you ask another question. Go ahead.

MR. PETTIBONE: Well, he is going on.

642 MR. WOLCOTT: Well, that's all right. Let him go on.

THE WITNESS: I think there is a point of confusion.

MR. PETTIBONE: I don't mind. Go right ahead.

THE WITNESS: There is two separate and distinct pay statuses that we have. One is a military. One is as air technician. They cannot be intermingled. If a man is being certified to time for military duty at that time he cannot be in an air technician pay status. If he is in an air technician pay status he cannot be in the other status; but neither of these statuses has any bearing on the fact of whether he is flying or not. The flying is separate and distinct.

Q. Well, now, you mentioned an air technician flying in an air technician status. Under what circumstances does an air technician, or can an air technician fly, befflying in an air technician status, as you use that term in your answer? A. Whenever he has his order or has a requirement to fly in support of any mission that we have, or in

support of his own personal proficiency. I will take
643 an example and explain.

Q. Yes, go ahead. A. At the present time we have been requested by the National Guard Bureau to fly radar missions for the Aberdeen Proving Ground, which we do. Now, you wouldn't find in the job description anywhere it says to fly radar missions for Aberdeen Proving Ground, yet we have that requirement and the individuals that we have hired have to fly in order to carry out this requirement. The manual that you are referring to there has no jurisdiction over flying status, yet it refers to flying status as being desirable in some cases, mandatory in others, but this flying status that that manual refers to is the Department of Air Force flying status, because there is only one. There are no two flying statuses; one distinct flying status that can be performed in four or five different pay statuses. Two men on the same mission can be in two different pay statuses, and I will give you an example there. We have pilots that get into the organization and they are authorized eight days active duty to familiarize themselves with the equipment. We have flying training supervisors that
644 are assigned to teach them how to fly and familiarize themselves with the equipment. So two men go up on the same mission. They are both flying in their flying status, yet one is an air technician, the other is in military status. Now, the next day this man might, that is flying in a military status, might exceed the authorized limitation of his days per day and he might be flying next to this air technician in the status without pay, but this has no bearing whatsoever on flying status. If that is confusing to you, it is confusing to everyone.

Q. No, I believe I understand it pretty well. Let me just ask you a couple other little details which I'd like to bring out to get clear. Now, as the Commanding Officer of the Squadron as well as Base Detachment Commander in your other capacity you can utilize then any personnel assigned to the unit who are available and have flying

status to perform flying to accomplish any mission which the unit or Squadron may have? A. Yes, sir.

Q. In your discretion. Now, in other words, that would be a flight made pursuant to your direction for the purpose of accomplishing the unit's mission. That is what
645 we mean by that, isn't it? A. It is the purpose of accomplishing the unit mission and also the accomplishment of air technician work requirements.

Q. Yes. I mean there are some requirements that have been placed upon the unit by some authority to do something and to accomplish it you have to have flying performed by some people? A. Yes, sir.

Q. So under those circumstances you utilize anyone there in your discretion who has the flying status that is needed in order to perform the flight? A. Yes, sir.

Q. Now, then, that of course would be different, a different purpose, a flight made on that basis then would be made for a different purpose, would it not, from a flight that an individual pilot elected to make himself for his own, to improve his own flying proficiency. Now I realize that sometimes they could overlap so that you could have it both ways. It might coincide both ways, but to keep the distinction clear—

646 MR. WOLCOTT: Now are you discussing this with the witness or submitting a question?

MR. PETTIBONE: I am just trying to form a question that is clear enough for him to answer.

MR. WOLCOTT: I object to that.

MR. MUDD: I think it is all right.

MR. WOLCOTT: In my case you find it perfectly all right, Mr. Mudd; rather in Mr. Pettibone's case, but I didn't find that true when I put the questions. Now I insist that the questions be put as questions.

MR. PETTIBONE: Well, they all have been questions so far.

MR. WOLCOTT: Except that one.

MR. PETTIBONE: I didn't finish it.

MR. WOLCOTT: I thought you had a question. Now you

have a discussion and now you are back in the question part of it again. Maybe you can restate it.

MR. PETTIBONE: No, I am not on the question now. This seems to be a discourse on the side we are having here.

MR. WOLCOTT: I am talking about your discourse and your question.

647 MR. MUDD: I am glad you are paying for the original.

MR. WOLCOTT: I am not paying for the original.

MR. PETTIBONE: Well, I think I am going to have to start over because I can't remember where I left off in the middle of that one now.

MR. WOLCOTT: You just put it in question form and I won't object to it on that ground anyway.

MR. PETTIBONE: Well, if the Reporter could go back—

(Question read by Reporter.)

MR. PETTIBONE: The balance of it is this. There is a difference—

MR. WOLCOTT: I suggest you restate your question.

MR. PETTIBONE: Yes. I agree. By now I agree.

By MR. PETTIBONE:

Q. Were there flights made by pilots of the Squadron at their own request or application to you for the sole purpose of improving or maintaining their own flying proficiency?

A. The pilots don't arbitrarily do it at their own request. The pilots receive their directions as to what they must fly. You are speaking about the weekend pilots.

648 now, I imagine, not about the full-time pilots. There is a distinction between the two. You made yours. I am asking a question.

Q. I didn't realize I made the distinction. Would you—I am not sure I realize what you mean. Maybe you better explain that too. A. We have pilots that are not air technicians.

Q. Oh, are they what you called weekend pilots? A. I am using the word weekend pilots.

Q. That's all right. I just want to make sure I know what you mean. A weekend pilot is a person not used as an air technician? A. I should not have used the term because it is generally not acceptable as a term. The pilots of the Squadron who are not air technicians, when they arrange their schedule to comply with the requirements laid down by the Commanding Officer so notify operations of their intentions to be available to fly and operations will schedule them for that flight.

Q. Well, then the first action to set up a flight by an individual on a given day in that respect then originates with the individual. Is that correct?

MR. WOLCOTT: He didn't say that.

MR. PETTIBONE: If I am wrong he can tell me. Maybe I am wrong. I am trying to find out.

THE WITNESS: On a training assembly day the people report for an eight-hour period and are scheduled for their flying. Now, the obligation remains to fly more than on the training assembly day. Since these people have civilian jobs we cannot direct them when to be there. We make the flying schedule available to them.

MR. PETTIBONE: You mean by civilian jobs, excuse me, you mean outside of your unit?

THE WITNESS: Outside of the unit.

MR. PETTIBONE: Yes. Go on. I'm sorry.

THE WITNESS: We make the flying schedule available to them and they schedule—they are scheduled through operations for their flying.

MR. MUDD: Colloquially they are known as weekend warriors.

THE WITNESS: If you use the phrase. I don't want to.

650 MR. MUDD: I will use it. You don't have to.

THE WITNESS: I don't want to get it in the record here as being used four thousand times in the next couple hours.

MR. PETTIBONE: Well, to me at least it wouldn't denote anything at all derogatory. It just merely indicates an

individual who only comes out onto the field for the purpose of performing his training. He is not regularly employed and not there all the time otherwise as these air technicians are. Isn't that about it?

THE WITNESS: Yes. The correct terminology, he is a Federally recognized officer of the Air National Guard of the United States, not an air technician.

By MR. PETTIBONE:

Q. Well, then these people in that status will from time to time perform flights, the purpose of which is to improve or maintain their flying proficiency? A. Yes, sir.

Q. That would be the sole reason for their making the flight? A. It could be or not be, according to the schedule.

Q. Yes. It can be the sole reason flights are made?
651 A. Yes, sir.

Q. Now, the other pilots who are employed as air technicians sometimes make proficiency flights where that is the sole reason also in the same manner? A. Yes, sir. It could depend upon the nature of their most recent duties whether they need their proficiency flight or not.

Q. Now, before any flight is made you have a procedure of obtaining a flight clearance which has to be complied with in the Squadron, do you not? A. Yes, sir, local flight clearance.

Q. Part of that procedure involves the filling out of a form, does it not, and submitting it to a clearance officer?
A. Yes, sir.

Q. That will either be to you or someone to whom you have delegated the authority to do it in your behalf? A. It would be to the designated operations duty officer of the day.

Q. All right, and would the request for a clearance to make the flight disclose the purpose for which the
652 flight was to be made? A. Not necessarily on the clearance.

Q. Well, would it be specified in some other manner

then? A. I think the proper place it would be designated would be on the flight operations order.

Q. What is the flight operations order? A. The flight order is the order issued by the unit from the office of the operations officer to cover each flight made by the unit.

Q. Such an order is issued to cover any flight made by anyone in the unit? A. It covers all flights made by aircraft assigned to our organization, whether they are in the unit or attached to the unit for flying.

Q. And do these orders indicate the nature and purpose of each flight? A. If my memory serves me correctly, it is on that order.

Q. Name a few of the common purposes for flights which appear frequently on such orders, or did just prior
653 to May 20, 1958. A. Well, the purposes for flights could be test flights, navigational proficiency flights, administrative flights.

Q. I suppose you have some flights that are for the purpose of just transporting people some place? A. Yes, sir. We get requests from the National Guard Bureau to do such missions and we have other requests to do things like that. They are very few.

Q. Well, the general practice though is to have the flight order which is issued—incidentally, is the flight order issued before or after the flight is made? A. The flight order on a navigational proficiency flight generally is required to accompany the pilot on the flight. That is his authority to be traveling from point to point. In some cases this order has to be shown to the transient services of the other base, but in general on local flights the order is not required to precede the flight. It is a verbal order that is backed up later in writing to account for all the flights made and generally have them accounted for on the order form.

Q. I presume you maintain a file of all these flight
654 orders covering a period of time? A. Yes, sir.

Q. At the Squadron Headquarters? A. Yes, sir.

Q. And is there a standard printed form of some kind that you use where you just have to fill in certain blanks?
A. Yes, sir.

Q. Is that the procedure? A. Yes, sir. There is a standard form lacking the order number and the information peculiar to the aircraft and individuals on that flight.

Q. And these orders, I take it, are all issued in your name pursuant to your position and authority as Commanding Officer of the Squadron? A. They are issued for the Commander by order of the Commander and authenticated by the Operations Officer or his designated assistant.

Q. Was that the situation on May 20, 1958? A. Yes, sir.

Q. And some time prior thereto when you were
655 the Commanding Officer of the Squadron? A. Yes, sir.

MR. PETTIBONE: Off the record.

(Discussion off the record.)

(Thereupon, at 4:00 o'clock p. m., the deposition was adjourned.)

662

Lt. Col. Victor F. Kilkowski.

was recalled as a witness and having previously been duly sworn, was examined and testified further as follows:

EXAMINATION.

By MR. PETTIBONE:

Q. Colonel Kilkowski, as I recollect you testified at our last session that when a member of the Unit made a flight that flight orders were issued either before or at the time of the flight or just after the flight, as the case may be, authorizing the flight and describing its purpose or
663 mission. Is that correct? A. That's true.

Q. Now I am going to hand you a document which has been marked United States Exhibit for identification No. 10. Is that the flight order which was issued covering Captain McCoy's flight on May 20, 1958? A. It is, sir.

Q. Does that flight order indicate the purpose or type of flight which Captain McCoy made on that date? A. It is true. It does.

Q. And what does it so indicate? A. It indicates that the purpose of the flight is one of maintaining flying proficiency.

Q. How is that designated on that order? A. It is designated in the actual wording of the order.

Q. All right. Do the words in this order "maintaining flying proficiency" which I have just quoted from the order, refer to Captain McCoy's personal flying proficiency?

A. Refer to the flying proficiency of any and all pilots that would be noted on the order.

664 Q. Yes, and he is one of the ones that is noted on this order? A. That's true.

Q. So in this instance it would apply to him, is that correct? A. Yes.

Q. All right. Now, in addition to the flight order which was just identified, it was also the practice and custom, I believe, for a flight clearance to be issued covering a flight when made by a member of your unit, is that correct? A. Yes.

Q. All right. Let me hand you United States Exhibit No. 9 for identification. Can you tell me what it is? A. It is Air Force Form 113, Local Flight Clearance.

Q. Who executed that particular form of which that is a copy? A. Captain McCoy executed the form as pilot of the flight.

Q. Is that the flight clearance which covers his
665 flight in a T-33 on May 20, 1958? A. It is.

Q. Does that flight clearance indicate the purpose or mission of that flight? A. There is a mission block on this flight clearance.

Q. And is that filled in? A. Yes, it is.

Q. And what does it state? A. It states that there is an "O".

Q. Is that a symbol? A. It is a symbol for flight; generally by flight of our F-84's and T-33's from our base.

Q. Well, a flight for what purpose or what mission?

A. I would have to get the manual to get the exact definition; but it indicates flight in aircraft general training, operational training.

Q. Now previously you had testified that on May 20, 1958 Captain McCoy was employed as an air technician under the job description or title of Aircraft Maintenance Chief, is that correct? A. Yes, it is.

Q. He was also a Captain in the Maryland Air 666 National Guard assigned to the Unit which you commanded on that date, is that correct? A. Yes.

Q. We also brought up the subject of the pay status of Captain McCoy in each of those capacities and you stated in response to one of my questions at that time that there are two separate and distinct pay statuses; one of which is military and the other of which is air technician and that there were these two possible pay statuses which could apply to Captain McCoy. Is that correct? A. That's true.

Q. You also pointed out in response to one of my questions that if a man is present for military duty at a given time he cannot be in air technician pay status at the same time. Is that correct?

MR. MUDD: Just a minute. Let me enter an objection at this time on the ground that Mr. Pettibone's questions are prefaced on the prior testimony of the witness which was clearly revealed in the deposition which is in front of him and, of course, the witness will reaffirm what he said previously, but I see no need to ask him if he 667 did not previously say this, and this, and this and that, inasmuch as the record speaks for itself on that.

MR. WOLCOTT: I join in that objection.

MR. PETTIBONE: That, of course, is quite true.

MR. WOLCOTT: May I complete my objection? I think the answer that Colonel Kilkowski gave before, the language that he used to express an accuracy of thought, and

I know that Colonel Kilkowski was trying to be very accurate, and I don't think it fair to summarize in your own version of what you think Colonel Kilkowski said, and I am sure you are trying to be accurate too, Mr. Pettibone. I would suggest that in order to take it out of the realm of dispute that you read that part of the testimony that you want to refresh the Colonel's recollection with.

MR. PETTIBONE: Well, I am agreeable to doing that. I was merely trying to do that, since nearly three months have elapsed, to go back sufficiently to be ready to continue on—

MR. WOLCOTT: Yes, I appreciate that, but I would suggest that you read his testimony.

MR. PETTIBONE: All right. I will refer to your 668 previous testimony. For the sake of refreshing your recollection I will refer you specifically to page 642 in the Reporter's transcript of your testimony and ask you at this time if you will read line 6 through, I guess, 14. Just those few lines. There is the page (indicating), and there is the text.

By MR. PETTIBONE:

Q. When a member of your unit was performing duty in a flying training period what was his pay status? A. Flying training period, the man was in a military pay status. After having fulfilled the requirements of the flying training period, at the end of the quarter, fiscal quarter in which he was doing the flying he was entered on regular military payroll along with his other training. His regular training assemblies and his flying training periods are put on the military payroll which is sent in for the issuing of a check for his duty.

Q. Then he would be paid commensurate with his rank, I presume? A. That is true. He is paid in military status which his rank and longevity and other military pay 669 status changes.

Q. Supposing the individual who received such pay in such manner were also employed as an air tech-

nician; that is to say, a civilian employee, as an air technician in one of the job categories allocated to your unit. Could he for the same hours of time involved have been also paid as an air technician? A. No.

Q. Or would those two have to be kept separate? A. You cannot receive the pay for both statuses. It is permissible to be covered under pay under both statuses by virtue of being on an annual leave or compensatory time status in your air technician job, but that is the only way that you may do it. You cannot be on duty in both statuses at the same time.

Q. In other words, then an air technician, if he were performing a flying training period activity would be either on leave from his civilian air technician employment or on compensatory time, or I suppose it could be done on a day when he wasn't supposed to work; in other words, 670 apart from his regular working hours? A. It could be done from outside of his outside working hours, or if his working hours were displaced from the regular working hours of that day it could be obtained during that time. The only provision is that he cannot be present for duty in the air technician status as well as present for duty in the military status.

Q. On May 20, 1958, as an air technician Captain McCoy began work at 8 o'clock that morning, is that correct? A. Yes.

Q. And then later that morning, approximately two and a half hours later, I believe he testified, he began a flight in a T-33, is that correct? A. Yes, sir.

Q. And he made the flight in the T-33 that morning under your authorization as the Commander of the Detachment? A. Yes.

Q. At the time he took-off on the flight that morning, on that day and throughout the duration of that flight in what pay status would Captain McCoy be carried by your unit?

MR. WOLCOTT: I object to that on the ground that the

records of the Air National Guard would be the best
671 evidence of that.

MR. PETTIBONE: Well, that is not an objection to the form of the question, necessarily, and in any event I'd like to point out that as the Commander—

MR. WOLCOTT: It calls for a conclusion of law.

MR. PETTIBONE: —as the Commander and as the Base Commander certainly he is in a position to be able to answer the question.

MR. WOLCOTT: Well, you can ask him what the record shows, but I think it is otherwise a conclusion of law.

MR. MUDD: I have no objection to the form of the question. I have no objection to the Colonel answering the question, if it is within his personal knowledge, insofar as what the records indicate. I think Mr. Wolcott's point that it may be a conclusion of law is something that may be well taken but I am perfectly willing to have the witness answer, if he knows.

MR. PETTIBONE: All right. Answer the question.

THE WITNESS: Captain McCoy was carried in an air technician pay status throughout the day. His status
672 changed during the day from present to a sick capacity whereby he started to apply his earned sick leave, which we tried to coincide with the time of the accident as closely as possible.

By MR. PETTIBONE:

Q. Apart from the fact that an accident occurred during the flight which he made that day as a result of which he was injured and went on sick status, was he otherwise carried on the records of your Unit as an air technician for pay purposes during that flight?

MR. MUDD: Same objection. The witness may answer, if he knows.

MR. DAVIDSON: You are referring now to the records. That is the very objection Mr. Wolcott was making earlier. You asked him an opinion. Now you have gone to the records, Mr. Pettibone.

MR. PETTIBONE: Let me just hold that question. I will come back to that. Let me ask you two or three preliminary questions; although I think this is already in the record at our previous session. He has already testified that he, as Base Detachment Commander, was responsible for the keeping of these records.

673 By MR. PETTIBONE:

Q. Going back though to that subject, Colonel Kilkowski, as Base Detachment Commander did you keep or have kept under your supervision the pay and attendance records for civilian air technician employees of your unit? A. Yes.

Q. Did you keep or have kept such records pertaining to the hours of work performed by Captain McCoy? A. Yes.

Q. Did you keep such records relating to the attendance and hours of work of Captain McCoy on and prior to May 20, 1958? A. Yes.

Q. Were those records used for determining Captain McCoy's pay or compensation for the work which he performed? A. Yes.

Q. Was receipt of his pay for such employment by Captain McCoy contingent upon the preparation and keeping of the records which I have just referred to? A. The question is somewhat vague. Captain McCoy was in an

air technician status with the Unit. We did keep
674 records on him. He was daily marked either present, sick, on annual leave, or annual leave without pay, and based on this pay record which is submitted on a payroll to Bolling Field he received a check in compensation for this, and this was done on Captain McCoy. He was in an Air Technician status that entire day.

Q. All right. Now, when he commenced the flight which he made on the morning of May 20, 1958 how was he carried on the records which you kept or were kept under your supervision for pay purposes? A. Carried "present".

Q. Present in what capacity?

MR. WOLCOTT: I submit he has already answered that.

MR. MUDD: Go ahead, Colonel, if you know.

THE WITNESS: Present for duty.

By MR. PETTIBONE:

Q. Do you mean present for duty as an Air Technician civilian employee?

MR. MUDD: Could you ask him—maybe we can get to the heart of it—if the records indicate in what capacity he was carried as present or whether they indicate one 675 or the other?

THE WITNESS: I think your terminology is getting me somewhat confused. Captain McCoy was hired as an Air Technician at the Maryland Air National Guard Base in the capacity of the Aircraft Maintenance Chief and as of 8 o'clock on 20 May 1958 he was marked present for duty in that capacity.

By MR. PETTIBONE:

Q. Well, now, was he later in the day marked not present for duty in that capacity? I believe you mentioned he went on sick leave, which is a different capacity, is it not?

A. That's true. If one of our employees is sick or injured and not capable of reporting for duty he goes on sick leave status. Each employee earns as a condition of his employment so many hours of sick leave per month, which he can accumulate and is carried on the records of the Unit and if he gets sick or is injured he is still carried in a pay capacity but he starts to use the sick leave in order to qualify for the pay.

Q. Do you know what time he went on sick leave on that date? A. I could not give you the exact time from 676 memory. I think it is indicated on the various records that have been produced here.

Q. Well, in any event it could not have been sooner than the time he was actually injured as a result of the airplane accident in which he was involved that morning, is that correct? A. It could not. I think the stipulation

on sick leave is that it is carried on the nearest hour and I would have to refresh my memory as to exactly when the sick leave condition started, and that could be produced from, as I say, from the records that have been introduced prior to this time.

Q. Well, if I understand you correctly, as an administrative procedure sick leave is computed to the nearest hour and not divided into minutes. Is that the point? Is that correct? A. As I say, I would have to refresh my memory, but as best it serves me right now it is credited to the nearest hour and also utilized to the nearest hour.

Q. What caused him to go on sick leave on May 677 20, 1958? A. The fact that we were notified that he was injured and would not be available for duty.

Q. That he was injured in this airplane accident that we are dealing with here? A. Yes, sir.

Q. Prior to the time when he was so injured, he was present for duty in his Air Technician employees status? A. Yes.

Q. After he took off in the T-33 that morning and prior to the time when he was injured in the following accident, was he in such status; that is to say, that of present for duty in his Air Technician employee status? A. As I stated he was present, marked present for duty in his Air Technician status up to the time of the accident and then he was marked sick, sick status; actually, the sick covering both injury and sickness.

Q. Would the time he spent making this particular flight on that morning have qualified him for the performance of a flying training period for the computation of time as part thereof for military pay purposes? A. No, it would not.

678 Q. Do you know whether subsequent to the making of that flight, or at any time he applied for the application of the time which he spent in making that flight to a flight training period for military pay purposes?

Mr. Mudd: Of the Colonel's own personal knowledge?

Mr. Pettibone: That's right.

The Witness: No, he did not.

Q. (By Mr. Pettibone) Well, by your own personal knowledge, I mean as Commander of the Unit you authorized flights to be made and you also verify the records pertaining to such flights for pay purposes, or it is done by your direction. Isn't that correct? A. That's true.

Q. I am referring to your capacity in that respect when I ask this question. A. You are referring to the time of 20 May. It was at that time.

Q. Yes, that's right. A. Mr. Pettibone, Captain McCoy was in an Air Technician status and was paid as an Air Technician that day. His pay was received from 679 appropriated money, Federal money for the purpose of his pay. His pay was applied for to Finance Office of Bolling Air Force Base and a check was issued. His pay did not cease at the time of the accident because he had accumulated sick leave in order to continue his compensation. If you are concerned about his aircraft flight, I mentioned in earlier testimony that he can fly in several statuses. The pay status that he is in does not have any bearing on his flying status. He receives his right to fly the aircraft by virtue of his rating as a pilot and by virtue of the order to participate in frequent aerial flight. There are no provisions in Air Technician directives that allow us to qualify a man for flight. There are provisions that the man may continue to fly in that status. Now, regardless of what status he is in, whether he is in the military status or in Air Technician status, he is flying by virtue of his rating and order to participate in frequent aerial flight when he steps into the aircraft. That is the best as I can say it. I know it is a rather nebulous thing, and this is the best I can do in my explanation of it.

Q. Well, Captain McCoy was employed to perform certain specified duties in connection with his work as 680 an Air Technician on May 20, 1958, was he not? A. Yes. He had certain designated duties which are by no means the limit of his duties.

Q. And those duties are described in a job description outline or job description form which is part of a civilian personnel manual describing various Air Technician jobs, is it not? A. Yes.

Q. Now I am going to hand you United States Exhibit No. 4 for identification. Is that the description of the position Aircraft Maintenance Chief which Captain McCoy held on May 20 1958?

Mr. Mudd: Does this page contain the complete description of Aircraft Maintenance Chief?

Mr. Pettibone: Yes. Off the record.

(Discussion off the record.)

Mr. Pettibone: For the record let me state that United States Exhibit No. 4 for identification is a copy of page 107 of Air National Guard Manual, ANGM, 40-01, entitled Civilian Personnel Manual, dated 1 March 1958, and page 107 thereof is entitled Aircraft Maintenance Chief, Job No. 43-10.

681 Mr. Wolcott: Could that manual be marked for identification, the manual itself, so we have a reference to it, on the cover of the manual?

Mr. Pettibone: I think we have done that already.

Mr. Wolcott: This particular manual?

Mr. Pettibone: I think so. According to the notes which I kept of our last meeting that was already marked at your request in the same manner as you asked United States Exhibit No. 11 for identification. So it is already marked.

Mr. Wolcott: It is already marked.

Mr. Pettibone: Come to think of it, it is already marked. The record may therefore indicate that the manual which I have just described is already marked United States Exhibit No. 11 for identification in connection with the taking of this deposition.

The Witness: May I just refresh my recollection.

Mr. Mudd: I presume Mr. Pettibone has no objection.

Mr. Pettibone: None at all. Can you answer the question now, Colonel Kilkowski?

The Witness: Will you read back the question?

682 (Question read by Reporter.)

Q. (By Mr. Pettibone) Did Captain McCoy during the period of time when he was employed under that job description as an Aircraft Maintenance Chief in your Unit perform the duties generally described therein? A. Captain McCoy performed those duties and other duties too.

Q. Do any of the duties described or listed therein require or permit him to make aerial flights?

Mr. Mudd: I will object, inasmuch as the document speaks for itself.

Mr. Wolcott: I join the objection.

The Witness: Should I answer?

Mr. Mudd: Go ahead.

The Witness: Captain McCoy performed the duties of Aircraft Maintenance Chief. At the time he was performing these duties we did not have a Maintenance Supervisor assigned at the Base. Captain Jesse D. Mitchell was undergoing training in a military status at Chanute Air Force Base and was slated to return to the Unit as the Aircraft Maintenance Supervisor and was hired so as

683 that time. So Captain McCoy, in addition to his duties as Aircraft Maintenance Chief, also had to assume, in Major Mitchell's absence, those duties of the maintenance supervisor. Under my job description as Base Detachment Commander it states that I am responsible to see that operations, administrative and related activities are operating in an efficient manner to accomplish the work load that is required and essential in preparing for the training of the Air National Guard personnel Units. Since we did not have a Maintenance Supervisor at the Base, Captain McCoy being the next senior Maintenance man on the Air Technician status had to assume his duties.

A check will show that the duties of the Maintenance Supervisor also included flying as a stated requirement,

or suggested requirement, and it was just good business to have the head of the Maintenance Section in a flying capacity and qualified as a test pilot and general pilot in all capacities. That way he had better control of the maintenance, quality control of the aircraft and we saw fit to assign him these additional duties.

Q. Now, the regular Maintenance Supervisor—is
684 that his correct title? Maintenance Supervisor? A. Maintenance Supervisor.

Q. Is that also an Air Technician civilian employee position? A. Yes, it is.

Q. For which a job description is provided? A. Yes.

Q. In the manual which you are referring to? A. That's true.

Q. And was that job regularly held on May 20, 1958 by Captain Jesse D. Mitchell? A. Correction. Major Mitchell, Major Jesse D. Mitchell, as I explained, was undergoing the course of training and was to return to the Unit in a pay status as a Maintenance Supervisor. He is presently in that status with the Unit now and has been in it since his return from the Chanute Air Force Base.

Q. Was he assigned to that position on May 20, 1958?

A. I'd have to refresh my memory on it but, as I remember it, he was assigned in a leave-without-pay status while
685 he was under—in a military pay status at Chanute Air Force Base.

Q. How long had he been absent in this leave-without-pay status that you have just mentioned prior to May 20, 1958? A. I can't answer that question without the records.

Q. Can you recollect the approximate length of time? Was it a short time or a long time? A. As I say—

Mr. Davidson: Would that be material here, Mr. Pettibone, whether it was a day, or a week, or a month?

Mr. Pettibone: Well, I really don't know because I hadn't heard of this whole situation before, so I am trying to find out about it myself and I am not sure yet.

The Witness: I think it is all in the record. It was covered before.

Mr. Pettibone: Well, it slipped my recollection at the moment, but that's all right.

Q. (By Mr. Pettibone) Did you as the Base Detachment Commander notify Captain McCoy on or before May 20, 1958 that he was to fulfill the duties and responsibilities of the Maintenance Supervisor in the absence of Major Mitchell? A. Yes.

686 Q. Did you do that in writing or verbally, or both?

A. Again I would have to check the record to refresh my memory.

Q. Is it possible that written orders were issued or published designating Captain McCoy to fill this position in addition to his regular one? A. Could be possible, but it is not absolutely necessary.

Q. Could you check the records of your unit for that period of time to ascertain whether or not any such orders were ever issued? A. I could check the records. I couldn't say for sure that they still exist, since this occurrence you are talking about is over two years ago.

Mr. Pettibone: Well, please do so and later I will have to recall you because I'd like to have an answer to this: I wish you would check the records of the Unit to ascertain anything that you can find which might show that Captain McCoy was the subject of either a written order or a written instruction, or any writings of any kind which would indicate that he was to perform the duties of

687 Maintenance Supervisor on May 20, 1958, during the absence of Major Mitchell on a leave-without-pay status. Will you let me know in due course, Mr. Mudd, about that?

Mr. Galiher: May I suggest, since your answer requests written documents, if there are any, that he answer it simply by producing them so we all may have copies, if there are any, or if he is unable to find any that he simply tell Mr. Mudd and Mr. Mudd can advise us.

Mr. Mudd: Let me say this, if there are such records and they can be located we will be glad to produce them, subject to any military order which might control the situation and which I am not familiar with right now; but certainly if it is available and there is no military reason or regulation why it should not be produced, be glad to do so.

Mr. Wolcott: Off the record.

(Discussion off the record.)

Mr. Pettibone: On the record again.

Q. (By Mr. Pettibone) Do you recollect at this time whether or not Major Mitchell was absent from the Unit for a fairly long period of time around May 20, 1958? A.

If my memory serves me correctly, the course that
688 he was undergoing was nine months.

Q. Did Captain McCoy perform the duties and responsibilities of maintenance supervisor in the Unit during that entire nine-month period, or most of it, at least? A. There was a period in there prior to May 20th Captain McCoy was actually named as the Maintenance Supervisor. Early in 1958 we received additional positions, Air Technicians. Major Mitchell was assigned as Aircraft Maintenance Supervisor. Captain McCoy was assigned as Aircraft Maintenance Chief. Exactly when this occurred, I do not know.

Q. Well, let me show you United States Exhibit No. 3 for identification, this being a copy of Special Order No. 93 of the State of Maryland, Fifth Regiment, Baltimore. Does this Exhibit No. 3 for identification enable you to refresh your recollection concerning Captain McCoy's change of status from Maintenance Supervisor to Aircraft Maintenance Chief and the date thereof? A. Yes, it does. The change was made on the 16th of May 1958.

Q. Then in other words, up to May 16, 1958, or perhaps I should say on and prior to May 16, 1958 Captain
689 McCoy was employed as an Air Technician under the job description title of Base Maintenance Supervisor? A. That's true.

Q. And on and after that date by that order then he was transferred to the job title and description of Aircraft Maintenance Chief, is that correct? A. That's true.

Q. Do I understand that notwithstanding such change in assignment nevertheless in fact on May 20, 1958 he was performing the duties of a Base Maintenance Supervisor—

Mr. Davidson: As well as—

Q. (By Mr. Pettibone) —as well as Aircraft Maintenance Chief? A. Yes. He had to perform those duties because being the senior maintenance man on the Base he had to assume the duties of the superior that was not present for duty at the time.

Q. Did his performance of duties as Base Maintenance Supervisor require him to make the flight which he made on May 20, 1958 in a T-33?

Mr. Davidson: Object to asking him whether it required him to make it at that time, Mr. Pettibone. It might permit him to, or might be appropriate.

Mr. Pettibone: Well, I will be glad to include that in my question.

Q. (By Mr. Pettibone) Did they require him to make the flight, or did they permit him to make the flight; either one, or both?

Mr. Mudd: You are asking now only about the classification of Base Maintenance Supervisor?

Mr. Pettibone: Well, perhaps before you answer this question let me ask one or two more to make it clearer.

Q. (By Mr. Pettibone) I am trying to get at, or course, the duties which Captain McCoy was performing as an Air Technician on May 20, 1958. I assume that from what you have already testified that in addition to those duties listed for his assignment as Aircraft Maintenance Chief he also performed additional duties which are properly described or referred to as those of a Base Maintenance Supervisor. Is that assumption of mine correct? A. Yes.

Q. So that now returning to my question, what I am trying to get at, of course, is this: Did the duties which he was performing as Base Maintenance Su-

pervisor, these being the duties in addition to those which went with his job, his regular job as Aircraft Maintenance Chief, permit or require him to make the aerial flight which he made on that date in a T-33? A. Again the question is difficult. If a man has a flying status and is hired in the position where his flying status will enhance his chances to do a good job as an Air Technician then he receives general requirement to maintain his proficiency in his capacity. In Captain McCoy's case he had such flying status, was fulfilling a job whereby his flying status would enhance his job ability and, therefore, received a general requirement to fly.

Mr. Mudd: Are you finished?

The Witness: Yes.

Mr. Mudd: All right.

Q. (By Mr. Pettibone) Well, now, is there any requirement though as respects his normal, assigned job on that date of Aircraft Maintenance Chief that he have proficiency or be qualified to fly as a pilot?

692 Mr. Buckmaster: I think he has already answered that.

Mr. Welcott: He answered it two or three times.

Mr. Pettibone: It seems to have slipped my mind. Could he answer it once more?

The Witness: There is no mandatory requirement. To further explain at this time, it is just good business practice when a senior man of an operation is missing that the next senior man in line takes over the duties of that position. He was required, since he did have a flight status granted by the Air Force, to maintain this flight status and perform flight checks, flight quality control of the aircraft and various other things. It is not a requirement in an Aircraft Maintenance Chief's position that he be on flight status. At the present time Major Jesse D. Mitchell having returned from school and assuming the duties of the Maintenance Supervisor is presently performing those duties.

Captain McCoy is still hired and retained as an Officer-Air Technician, and is not on flying status and not required to fly. I think you have to put yourself in a position of the time that occurred at that time—excuse me, 693 the status that we were in at that time as to whether he would have the flight requirement or not. I think I would be amiss as a Base Detachment Commander of having a man qualified to check the quality control of his aircraft performance, flight tests, and in general better know the maintenance of his aircraft and not require him to fulfill his duty.

Q. Well, insofar as you know, this flight made by Captain McCoy on that date was not made for any specific maintenance purpose or function, was it? A. No, it was not.

Q. It was made, I take it, from what you say then, as a matter of good business practice, did you say, in the general conduct of the Unit as Commander of it?

Mr. Mudd: Just a minute. Now, again what the Colonel has said is clearly in the record and I think it is a little bit repetitious to ask him if he has said this and if he has said that.

Mr. Pettibone: Well, I don't want to do that.

(Testimony read by Reporter.)

Mr. Pettibone: Off the record.

694 (Discussion off the record.)

Mr. Pettibone: On the record I withdraw my question.

Q. (By Mr. Pettibone) On May 20, 1958, was Captain McCoy the next senior man under Major Jesse Mitchell?

A. Yes, in the Maintenance field.

Q. Is there a job description of your own authorities and responsibilities as Base Detachment Commander which was in effect on May 20, 1958? A. Yes, sir.

Q. Does any part of that authorize you to permit the making of the flight which Captain McCoy made on May 20, 1958 for the reasons which you have stated here?

Mr. Mudd: I object inasmuch as that document would also speak for itself. If you want the Colonel's interpretation of the document or his duties, I have no objection to that.

Mr. Pettibone: Well, I didn't ask him to recite any specific part of it. I just asked him if it authorized him to do this. He should know that. He held the position. He was Base Detachment Commander.

695 Mr. Mudd: Well, I object. Again, if you are asking him what his job description authorizes him to do then the best evidence is the description itself.

Mr. Davidson: He really ought to have an opportunity to see it, Mr. Pettibone. There is such a document, I understand.

Q. (By Mr. Pettibone) Is the description of your job as Base Detachment Commander on May 20, 1958 contained in the United States Exhibit No. II for identification, which is there before you on the table? / A. Yes, it is.

Mr. Wolcott: Could you give us chapter and verse on that?

Mr. Pettibone: Yes. Give us the job title and the page number from that exhibit.

The Witness: Page number 23. Base Detachment Commander. At that time the job number was 00—it is either 02, or 01. There was a change about that time. I can't remember the exact date of the change. Both these job numbers that I show are listed down here and merely means the difference in the grade.

696 Q. (By Mr. Pettibone) Will you please indicate which item in this job description which you have just identified authorizes you as Base Detachment Commander to approve and allow the flight which Captain McCoy made on May 20, 1958.

Mr. Mudd: Again I object inasmuch as the document speaks for itself, but will permit the witness to answer.

The Witness: There is no authorization in this document to authorize me to allow any individual to fly unless

he have prior approval of the Air Force. Before I can direct any one to fly under this document the pilot in question has to have a rating and an active flying status order with the United States Air Force. If he has that and his duties require flight then by virtue of this document I can require his participation in flight. Prime example of that would be a flying training supervisor where a flight status is mandatory as a condition of his employment. In other cases flight status is desirable but yet not mandatory, but in any case this document does not allow me to take any Air Technician by virtue of his being an Air Technician—the man in question has to have prior rating and flight status.

697 Q. Well, now, are you finished? A. Yes.

Q. On May 20, 1958, to your knowledge Captain McCoy had been authorized by the Air Force to fly and did have a rating—is that what you call it? Rating for flight status? A. There are two conditions. There is a rating as either a pilot, senior pilot or command pilot. In Captain McCoy's case he was a pilot and also a current flight status which is an order directing this individual pilot to participate in frequent aerial flight.

Q. Well, then to your knowledge had Captain McCoy satisfied both those conditions? A. Yes, he had.

Q. On that date? A. Yes.

Mr. Davidson: Did I understand that both of these are from the United States Air Force?

The Witness: To the best of my recollection they both come from Secretary, Air Force Office, or Department of the Air Force.

Mr. Pettibone: Will the Reporter go back and read
698 that last long answer?

(Testimony read by the Reporter.)

Q. (By Mr. Pettibone) Did Captain McCoy's duties as an Air Technician require him to make the flight which he made on May 20, 1958?

Mr. Davidson: It seems to me that has been answered.

Mr. Mudd: Objection again as to the word "require".

Mr. Pettibone: Look. I just made notes right out of the answer which he gave to the question. He said: Only if the duties of an Air Technician require can I authorize such a flight. I mean that has just been read out of the record so I could get it straight, so my question is based exactly on what he said. I can't accept the objection for that reason. Sorry.

Mr. Mudd: It is all right. You don't have to accept it. I just want to make it.

Mr. Pettibone: Well, I would be glad if we could agree.

The Witness: It was desirable that Captain McCoy fly, since he was in addition to this other duties carrying out those of the Maintenance Supervisor and under the 699 qualification it states that it is desirable that he be a rated flyer on flying status and he was carrying out those duties which do not necessarily always involve maintenance activity but involve just general proficiency and other flight activity.

Q. (By Mr. Pettibone) When you use the term "desirable" in your answer to this question are you referring to your own personal or official preference, or is the term as you have used it based on a specific provision in the job description? A. It is in the job description and contained in the manual.

Mr. Mudd: Identify and quote it, if you will.

Q. (By Mr. Pettibone) All right. Will you please indicate the exact reference to which job description on which page in which manual that is to be found? A. Page 105, the job description of Maintenance Supervisor, Job No. 43-00. It is under Section 6-B-2.

Mr. Mudd: If Mr. Pettibone has no objection, could he, since we don't apparently have any extra copies, read that part into the record, Mr. Pettibone.

Mr. Pettibone: Yes, it is all right with me.

700 Mr. Mudd: Read from B.

Mr. Pettibone: The only thing we don't have for

the record is the statement of which manual this is. It is the manual which has been marked as United States Exhibit for identification No. 11 and he is reading at page 105 thereof. Go ahead, Colonel Kilkowski.

The Witness: Correction. I am reading from page 106, Section 6-B-2.

Mr. Mudd: It began on 105. He has turned the page and the quoted portion is on 106.

The Witness: There are two desirable qualifications listed for this position, completion of an Air Force Maintenance Management Course and be a rated pilot on flying status to enable incumbent to make test flights on assigned aircraft.

Captain McCoy had both these qualifications.

Q. (By Mr. Pettibone) Are either or both of those qualifications required of an Aircraft Maintenance Chief?

Mr. Wolcott: This is "required" rather than "desirable"?

Mr. Pettibone: Right.

701 Mr. Mudd: Yes.

The Witness: There is no stated requirement as such in Aircraft Maintenance Chief job description.

Q. (By Mr. Pettibone) Did Captain McCoy personally request permission from you to make this flight on May 20, 1958 before he made it? A. Yes.

Q. Did you discuss the flight with him at that time? A. If my memory serves me correctly he discussed the flight with me the preceding Saturday prior to the accident; or I should say prior to that May 20 and indicated that he had an individual that was interested in flying training program, would I clear such a flight in the future. I indicated that I would.

On the morning of May 20 he indicated that he was going to take a proficiency flight and had the individual in mind that he discussed with me prepared to fly with him, would this be approved. I said "Yes."

Q. Did he mention any other reasons for wanting to make this particular flight on that day? A. Reason for the flight was his general proficiency.

702 Q. Well, you mentioned that already. Did he mention any other reason? A. I think prior testimony would show that Captain McCoy himself indicated just general other reasons and I indicate those too. In my capacity as Base Detachment Commander I fly for proficiency but at the same time I check the efficiency of the Air Crew personnel, the efficiency of the Tower personnel and all associated flying activities. Captain McCoy would be checking on these two at the same time; the way the aircraft handles, the way the aircraft performs and in general will know the knowledge of, better knowledge of his maintenance without making a specific flight check; the way the aircraft forms are kept, the way the maintenance people on the line react. These are all side-lights on the flight of general proficiency.

Q. My question though was this: Did Captain McCoy mention any of those or any other reasons for making the flight which he made on May 20th? A. The only indication was for general proficiency.

Q. On May 20, 1958 did your Unit have any special missions of any kind assigned to it which required
703 it to make other than the normal number of flights made for the normal purposes as a matter of routine operation of your Unit?

Mr. Mudd: Object on the ground of materiality. The witness may answer, if he can.

The Witness: To be perfectly honest I'm afraid I don't understand the question.

Mr. Mudd: All right.

Q. (By Mr. Pettibone) Well, in the answer to one of my previous questions; not today, but the last time we were here, you gave an answer and as part of it you mentioned that at a certain time your Unit was assigned a special mission which involved extra flying of some kind

for some purpose. I can't say that I remember the exact details now but my question is to inquire whether or not there was any such mission on May 20, 1958?

Mr. Mudd: Same objection.

The Witness: I think I know what you are referring to and I will answer the best as I can. As I recollect it, when I mentioned special mission I was referring to radar tracking missions that we were running with and for the Aberdeen Proving Ground.

704 Q. (By Mr. Pettibone) Would you like me to—
excuse me for interrupting, but if you'd like I can read you from page 643 of the transcript exactly what you said in that connection.

Mr. Mudd: Why don't you read it off the record?

(Discussion off the record.)

Mr. Pettibone: That is the type of thing I am referring to.

The Witness: In other words, you mean was that a special mission?

Mr. Pettibone: Yes. That is the term which you used. All right. Go on.

The Witness: Well, that answers it.

Mr. Mudd: I believe his question is whether on May 20th there was any special mission that the 104th engaged in.

The Witness: No. I think I can safely say that there weren't on that day.

Q. (By Mr. Pettibone) There were not on that day?

A (Shakes head negatively.)

Q. Is that right? A. That's right.

705 Q. I believe you mentioned in your testimony that Captain McCoy was authorized to make test flights to check out equipment; that is to say, aircraft, is that correct? A. Yes.

Q. Let me show you United States Exhibit No. 5 for Identification, which is a copy of Standard Operating Procedure No. 3. Do you recognize that? Can you state what it is?

My question was can you identify that? A. It appears to be a true copy of an SOP that was published on 2 January 1957. I can't vouch for the wording of it. It is not complete as it sits here; since the Standard Operating Procedure bears no signature line on it and I can't remember, my recollection doesn't tell me whether there was another page of this or if this information is correct here.

Q. Where is the original of that document at the present time, if you know? A. I do not know. The original of all these documents were turned over to the Air Force Investigating Board from Bolling Field.

706 Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Let me ask you this, on the record. Could a true copy of Standard Operating Procedure No. 3 dated January 2, 1957 be found in the files or records insofar as you know of your unit at this time? A. To the best of my knowledge, no.

Mr. Davidson: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) As Base Detachment Commander on and before May 20, 1958, how frequently did you authorize Air Technicians employed by the Unit to make flights for the purpose of maintaining or improving their general flying proficiency as you did on May 20, 1958 with respect to the flight made by Captain McCoy?

Mr. Mudd: Object.

The Witness: I don't recollect that information now.

Q. (By Mr. Pettibone) Well, did you authorize those kind of flights frequently or infrequently?

Mr. Wolcott: I think the record shows how many
707 flights per week.

Mr. Pettibone: No, that is not what I am asking him.

Mr. Mudd: You are also presupposing that there were other Air Technicians on flying status.

Mr. Pettibone: Yes. Well, perhaps I should ask that.

Q. (By Mr. Pettibone) Were there other Air Technicians besides Captain McCoy who met the requirements for flying status of the Air Force, as you have outlined them?

A. Yes.

Q. About how many others were there, or exactly how many others were there on May 20, 1958? A. I would have to search the records at the time, Mr. Pettibone. I think it is already in the record. After we reflected on that answer quite a long while before I think we came out with a number. I have to make a guess, John, that's all.

Mr. Mudd: Just state approximately.

Mr. Pettibone: That will be all right. Just state approximately the best you can.

708 Mr. Mudd: Six, a dozen, two dozen, eight? Just a rough approximation.

The Witness: Roughly six.

Q. (By Mr. Pettibone) All right. Now returning to my question, did you frequently or infrequently authorize any of them to make such flights for that reason?

Mr. Mudd: Excuse me. Would you state again what you mean by "for that reason"?

Mr. Pettibone: Well, go back and read my very first question.

(Question read by Reporter.)

Q. (By Mr. Pettibone) That is my question. Did you authorize flights of that type frequently or infrequently?

Mr. Mudd: Objection. Now you answer if you can.

Mr. Davidson: Isn't that kind of a vague term, as to what is meant by frequently or infrequently, and I assume these things would be of record to show when the flights were made.

Mr. Pettibone: Well, I am hopeful at getting it more specific myself. If he gives me an answer to that ques-

tion perhaps I will be able to follow it with further
 709 questions too. I would like to know exactly, if I could,
 how often and when such flights were authorized by
 Colonel Kilkowski.

The Witness: Well, frequently is a matter of degree. It all depends on what you consider repetitious enough to be called frequently. The Air Force uses the word "frequently" in their direction to participate in frequent flights and it could be as little as fifty flights a year, accumulating a hundred hours; but I tell you the truth, I couldn't possibly recollect two years ago what people did in an Air Technician status as to whether it was frequent or not frequently, based on your knowledge of what that means.

Q. (By Mr. Pettibone). Well, let me ask you this. Did you authorize one flight of such nature one a week, generally? A. Mr. Pettibone, I can't recollect. You have to realize that these people could be in an Air Technician status and at other times they are in a military status.

Q. How recently were you the Base Detachment Commander out there at this Unit? Are you still the
 710 Base Detachment Commander? A. Yes.

Q. You are still the Base Detachment Commander? Well, at the present time, say during the past six months how many flights have you authorized Air Technicians to make to improve their general flying proficiency?

Mr. Mudd: Objection. The question is completely immaterial. Go ahead and answer it.

Mr. Wolcott: It is outside the scope—

Mr. Davidson: I object on the grounds expressed here.

The Witness: This is an extremely variable thing, Mr. Pettibone. I might go on to explain a little bit. If we receive from the United States Air Force an order requiring that we participate in some sort of maintenance activity that requires all the aircraft to be flight checked, that particular coming week the Maintenance Supervisor might have to fly fifteen times to flight test fifteen aircraft,

helped out by the Flying Training Supervisor. If we have good weather and we have weapons delivery range available and we have people that are available to come
 711 down and fly, again it might be quite a bit. Now, the following week we might have bad weather, no range times, no flight test to make, and it could possibly be that nobody flew for the entire week. So this is an extremely variable thing depending upon the work load at the time. That is the best answer I can give to you on it. I am not trying to be evasive.

Q. (By Mr. Pettibone) I appreciate that very much. Actually I didn't mean to refer to flight for the purpose of testing equipment or aircraft, or any other such purpose related thereto. I was referring only to flights, the purpose and intent of which is to improve or maintain the flying proficiency of the individual who is piloting the plane.

Mr. Wolcott: It has already been testified to last week, Mr. Pettibone.

Mr. Pettibone: Last week?

Mr. Wolcott: I mean—I'm sorry, last time it was testified to. I asked him the question.

Mr. Pettibone: Did you get an answer?

Mr. Wolcott: Yes. It is right in the record.

Mr. Pettibone: I have no recollection of any such
 712 question or answer, but my memory may be faulty, although I have read this over very carefully. I don't mean to embarrass you. You can point it out to me. I would genuinely appreciate it. Off the record.

(Discussion off the record.)

Mr. Pettibone: Back on the record.

Q. (By Mr. Pettibone) Do you have any recollection now that you ever authorized any Air Technician employed by your Unit on or before May 20, 1958 to make a flight during duty hours or while on duty status as an air technician for the purpose of improving or maintaining his

flying proficiency? A. Yes, I have, in conjunction with the duties. Yes.

Q. Can you mention any specific ones, naming the individuals or the date or time of the flight? A. I can't mention the date or time of the flight. I can merely say that assuming that a man has a responsibility to flight test aircraft which might occur rather infrequently, you don't put him in that aircraft to flight test it without maintaining his proficiency. He is supposed to be one of the most qualified people you have and he will have
713 a flight test one day and maybe the following couple days he might have a proficiency flight to maintain this proficiency in order to flight test.

Q. Excuse me. Now I don't mean to interrupt you, but I don't want to be concerned in this question with any flights which were made to test the equipment, for flight test as you are using that term.

Mr. Mudd: Well, he just mentioned, go up two or three days later on a proficiency flight. The latter part of his answer mentioned proficiency flight.

Mr. Davidson: He answered your question the first thing, that he couldn't mention specific dates or anything, but then went on to explain why these men have to have proficiency flights.

Q. (By Mr. Pettibone) Was the authorization of such flights by you on or before May 20, 1958 a common occurrence? A. Yes, it was a common occurrence and still is. I will give you an example why it has to be. On one day a flying training supervisor might lead a flight to the gunnery range and in addition to trying to qualify the other people in the flight, which might be people in
714 the military status, he is also seeking his own qualification. Then after he reaches his own qualification he will fly for proficiency and also lead flights down there to bring up the other people's qualifications as a matter of his duties. So, in one case, even in both cases, even though he is doing the same thing one might be called

his own operational training and the other his training for proficiency. It is a matter of terminology.

Q. All right. A. Each of them are within the scope of his duties.

Q. That is true, but now eliminating all those flights where maintaining proficiency is incidental to other things in the manner in which you have mentioned, such as flying down to a gunnery range or bringing people back, and all the other purposes for which a flight might be made; let's confine it now just to those cases where none of those conditions exist and the flight is made solely for the purpose of maintaining the individual's flying proficiency and for no other reason. Do you recollect that you authorized any other flights for that sole reason by these air technicians on or before May 20, 1958?

715 Mr. Wolcott: I object.

Mr. Mudd: Objection.

Mr. Wolcott: I object to that question. In the first place that question makes an assumption of fact which is not in the record, and an assumption of fact that you make that flight on May 20th had no reason.

Mr. Pettibone: All right. You stated your objection.

Mr. Wolcott: I think you are making an assumption there and I'd like to point that out to the witness. It is inconsistent with the witness' prior testimony.

The Witness: I stated—

Mr. Mudd: Wait until everybody gets through.

The Witness: I stated before in elaboration on another question and I will state again that there is no flight that has as its beginning and end solely proficiency; any flight taken by an air technician, because by virtue of their duties they are bound to observe other things that fall under their jurisdiction.

In my case as Base Detachment Commander, responsible for the overall flying supervision of the Base, I
716 cannot take a flight unless I witness the other activity that is in support of that flight and be able to render

a decision of whether it is proper. The Operations Officer is the same. Flying Training Supervisors, Maintenance Officer is the same. He goes up on a flight. He couldn't possibly fly without recognizing the quality control of the maintenance that his people are turning out.

So even though the stated reason is proficiency, the actual end is to improve these people in the ability to do their job and Unit proficiency. The directive under which the entire Unit trains once it has received the qualification level which our Unit is presently in is a terminology proficiency.

You try to draw a fine line when you refer to proficiency. Every time you drive your car you are gaining proficiency, but that is not why you drive it. Now, if I am vague, I'm sorry, but I'm trying to be as helpful as I can on these technical points.

Mr. Pettibone: Those are all my questions. No more.

(Thereupon, there was a recess from 12:30 to 1:30 o'clock p.m.)

717 Examination by Mr. Wolcott

Q. You mentioned the Aberdeen Proving Grounds, Colonel. What are they? Is that a United States Government Reservation? A. It is, to the best of my knowledge, operated by the United States Army.

Q. It is the area a reservation of the United States? A. It is a Reserved Air Space, designated as such. The United States Army conducts its operations within that area.

Q. You also stated that there was a radar tracking project which was sponsored by the United States Government. Now can you tell us something about that insofar as it affected your operation? A. I think that the conditions of the project would be such that all I could say is that we do fly aircraft in conjunction with the project there. Our knowledge of the project is extremely limited and we use

the aircraft for tracking only. We have designated points to fly over and I couldn't elaborate on the project at all.

Q. Well, is that project sponsored or operated by the United States Government?

718 Mr. Pettibone: Excuse me, Mr. Wolcott, I have to object.

The Witness: I do not know.

Mr. Pettibone: There is nothing to show that that has any connection with the time or place of this accident.

Mr. Wolcott: Will you answer it?

The Witness: I do not know what agency is actually doing the work.

Q. (By Mr. Wolcott) Well, it is an agency of the United States Government? A. I assume so.

Q. As I understand it, your aircraft are directed to participate in this project of this agency? A. We have the authorization and the assigned flying time from National Guard Bureau to participate in the project.

Q. That is the National Guard Bureau in the Pentagon? A. Yes.

Q. Is this tracking a weather operation or what kind of an operation is it generally? Can you characterize it generally? A. Mr. Wolcott, from the type of mission that it is I'd prefer not to elaborate. I have
719 given you as much as I know about it.

Mr. Pettibone: I'd like the record to show that I object to all the questions in that series on the ground that there is no showing of relevancy in any way in connection with the time and place of the accident involved in this litigation.

Q. (By Mr. Wolcott) Do you know a Colonel Irving Ebaugh? A. Yes, sir.

Q. What is his status? A. Colonel Ebaugh is the United States Property and Fiscal Officer for the State of Maryland.

Q. Was that his status in May 1958? A. Yes, sir.

Q. Prior to the accident and at the time of the accident?

A. Yes, sir.

Q. Is Colonel Ebaugh an officer of the United States Military Forces?

Mr. Pettibone: I'd like to make your same objection. That calls for a conclusion, which the witness hasn't demonstrated he is qualified to state.

Mr. Wolcott: I think he can answer it. Let him go ahead and answer it.

The Witness: It is my understanding that Colonel Ebaugh is on—Lieutenant Colonel, on active duty and as such is the United States representative for Property and Fiscal matters in the State of Maryland.

Q. So he is acting as representative of the United States Military organization with respect to Maryland matters, is that it? A. This is my understanding, yes.

Q. When you say Fiscal Officer, does that have to do with disbursing Federal funds? A. Yes.

Q. Insofar as they refer to the Maryland District? A. I don't want to comment on the broad sense of Colonel Ebaugh's duties. Our connection in regard to our budget is that the money for our various projects within the State, which include Air Technician pay and various other services, and what-not that we have to procure, is allocated to the United States Property and Fiscal Officer for our Base, or Bases at that time of May 20.

He takes the budget and breaks it down for the two bases in question at that time, Harbor Field and Martin, and these are the appropriated monies that we use for our conduct of our operations.

Mr. Pettibone: Excuse me, Mr. Wolcott, but the duties and responsibilities of Fiscal Officers is set forth in full in Title 38 of the United States Code, which is a matter of record and nothing the witness can say one way or the other will change it or add to it.

Mr. Wolcott: Well, I will also refer to the Code at the appropriate time, Mr. Pettibone.

Mr. Pettibone: Well, I just hoped I might save some time here.

Q. (By Mr. Wolcott) Now, as I understand it, Colonel Ebaugh is the top United States Officer having charge of military property, such as the aircraft assigned to the Maryland Air National Guard?

Mr. Pettibone: I object.

Q. (By Mr. Wolcott) Is that right?

Mr. Pettibone: I object to the form of the question. I don't know what the word "top" means and I can't believe that the witness does.

Mr. Wolcott: All right. Is the United States Officer in Maryland that has charge of aircraft assigned for use by the Maryland Air National Guard?

Mr. Pettibone: I object to the form of that question. It is not clear at all what is intended by the question. The witness has already stated that Colonel Ebaugh is the Property and Fiscal Officer of the State of Maryland.

Mr. Wolcott: I know that.

Mr. Pettibone: I don't know what else he can add to that.

Mr. Wolcott: Well, let's find out what he can add to it. Can you answer that question, Colonel?

The Witness: I'm afraid anything I might say in regard to Colonel Ebaugh's duties might be misleading and any conclusion on my part to that question would probably be misleading.

Q. (By Mr. Wolcott) Well, does he supervise in general the use of Government property, military property by the Maryland Air National Guard?

Mr. Pettibone: I object to the form of the question, also the meaning of the word "supervise" until it is explained to the witness.

Mr. Wolcott: Well, I definitely will not explain it and I will ask the witness to answer it.

Mr. Mudd: Go ahead.

The Witness: At Air National Guard Base Colonel

Ebaugh has two representatives who are his assistants, one for fiscal and one for property, and the technical supervision of these two individuals is under the United States Property and Fiscal Officer.

Q. (By Mr. Wolcott) What does the Property Assistant do? A. State that again, please.

Q. I say what does the Property Assistant do? What are his duties, as far as you know? You mentioned that he had two assistants, one fiscal and one property, and I am asking you now what the Property Assistant does. A. Well, at the Base we have a Base Supply, which is the recipient of incoming supplies to be issued to the Unit.

We also have our Unit supplies. The Base Supply
724 Warehouse contains the property that is coming into the State for disbursement to the Unit.

Q. Does that include all United States property, such as aircraft and parts? A. I do not know exactly how the aircraft are assigned on paper, but I believe that it does.

Q. All right, and on the fiscal side what does the fiscal—by the way, who is that Property Officer that you refer to?

Mr. Mudd: Present or past?

Mr. Wolcott: At that time.

The Witness: Are you speaking of the Assistant U. S. P. & F. O. Property?

Mr. Wolcott: That's right.

The Witness: That is Major James I. Considine.

Q. (By Mr. Wolcott) And where is he based? A. He is based at Martin.

Q. Is he still there? A. Yes, sir.

Q. All right. Now, on the fiscal side tell us who
725 he is and what his duties are. A. Well, at the time of the accident we did not have a separate Assistant Fiscal Officer for the Martin Airport. The one Assistant U. S. P. and F. O., Fiscal, who was assigned at Harbor Field received the budget allocations for both bases at that time. We had an authorization for one but we were having a little trouble hiring a man at the time of the accident.

Q. And what are the duties of that office? A. To receive the budget allocations, work in conjunction with the Base Detachment Commander on expenditures, keep a running account of their assets and expenditures, and also to render reports from their office.

Q. Does that include the expenditures for maintenance and maintenance employee pay and so on? A. Base accounting system, yes, sir. It could include all these things.

Q. Now, what department or agency prepared the job description for the civil employees?

Mr. Mudd: Will you clarify that to the extent of amending it to technicians?

Mr. Wolcott: Yes, that would be better. Thank you.

726 Q. (By Mr. Wolcott) Referring particularly to Air Technicians. A. The job descriptions of Air Technicians are contained in the Civilian Personnel Manual, ANGM, 40-01, which is prepared and published under the title of Department of Air Force, National Guard Bureau.

Q. Is Colonel Ebaugh also a member of the Maryland Air National Guard? A. No, he is not.

Mr. Wolcott: Now may I have Exhibit 10, please?

Mr. Pettibone: Sure.

Q. (By Mr. Wolcott) One other question. When a passenger such as Chalmers is taken up does the passenger sign a release, form of release? A. Yes, sir. Policy is that anyone flying in the aircraft not as a crew member signs a release form.

Q. Did Chalmers sign a release form here? A. Yes.

Q. Do you have a copy of it here?

Mr. Pettibone: I'm sorry. I don't have it with me.

Q. (By Mr. Wolcott) Do you have it here, Colonel 727 Kilkowski? A. (Shakes head negatively.)

Mr. Mudd: No, I don't think so.

Mr. Wolcott: Could that be produced, Mr. Pettibone?

Mr. Pettibone: Well, really all I have—

Mr. Wolcott: I don't mean now. I mean at some future time.

Mr. Pettibone: I might say this. We have, the United States, as far as I know at least, has only a copy of it, that being the copy which the Civil Aeronautics Board used at their proceedings and I have the copy which they disseminated at that time. That's all I have myself. I don't know where the original is or who has it.

Mr. Wolcott: Yes. Well, it has been testified that Mr. Chalmers signed one. Off the record.

(Discussion off the record.)

Q. (By Mr. Wolcott) Now, do you recall that form? Who supplies that form? A. I think the form is locally reproduced, reproduction of a form that was illustrated in one of the regulations concerning flying.

728 Q. What regulation is that? You mean the Air Force regulations? A. I believe this regulation is an Air National Guard regulation.

Q. That is one of the regulations I think you testified that are promulgated by the Air Force, is that right? Is that right, sir? A. I think you could probably find better the procedure for issuing regulations from the National Guard Bureau and the Air Force. We do know that it was put out under the Department of Air Force, from the office of the Secretary of the Air Force, Department of Air Force.

Q. Do you recall, Colonel, who is released under that form? Is that a release running to the—to whom? A. I do not recall at this time the wording of the form.

Q. Colonel, do you recall at what time this order, dated May 20th, which has been marked Exhibit 10, was cut or issued? A. I don't remember the exact time, no.

729 Q. Do you recall that it was issued sometime later in the day on May 20th? A. I don't remember what time it was issued.

Q. Well, let me ask you this then. Does it often occur that the formal order is cut or issued after the flight has taken off; say at the end of the day the flights are tabulated

and then they are listed on the order? A. It could occur after the flight has taken off; merely a confirmation of the verbal orders that authorize the flight.

Q. And it is merely filling out a form telling what has happened during that day insofar as flights are concerned?

A. It is the official record of flying performed by the Unit.

Q. And it is often filled out at the end of the day when they are all summarized and tabulated, is that right, sir?

A. Depending upon the amount of flying. Yes, it could be after the flights had taken place; not in all cases. Cases of navigational proficiency flights, it is often possible that the order will precede the flight, so that the man has in his possession a flight order when going to another base, destination.

730 Q. Well, when that order that was cut there Exhibit 10, for Captain McCoy, that was not a navigational proficiency flight, is that right, sir? A. No, sir. Mr. Wolcott, I cannot say what time of the day this order was cut.

Q. I am not asking you that, but I say that was not a navigational proficiency flight? A. No, sir, it was not.

Q. And it is possible that that order may have been cut at the end of the day, is that right, sir? A. It is possible it could have been cut after the flight.

Q. Could the fact that various flights are listed on the same order indicate that?

Mr. Wolcott: I withdraw that question.

Mr. Galiher: May I ask a question?

Q. (By Mr. Galiher) Colonel, from time to time you have referred to Air National Guard. Do you mean Maryland Air National Guard or United States Air National Guard?

Mr. Pettibone: I object to the form of the question. We have no United States National Guard that has
731 been defined in these proceedings by anyone and for that reason I object to the form of the question. It doesn't relate to anything.

Mr. Davidson: National Guard of the United States.

There is the Air National Guard and then the Air National Guard of the United States, I believe. Isn't that correct?

Mr. Pettibone: Yes, but that is different from saying the United States Air National Guard.

Mr. Galiher: I will accept the correction. I apologize. I did not intend to misstate. Now, would you answer it as corrected by Mr. Davidson, Colonel, please?

The Witness: When I use the phrase "Air National Guard" or "Maryland Air National Guard" I am speaking about the Unit personnel of the Unit assigned, which is Federally recognized by the United States.

Q. (By Mr. Galiher) There is an Air National Guard of the United States, is there not? A. Mr. Galiher, I wouldn't care to get into a discussion of the various statuses of the Air National Guard without having the regulation before me.

Mr. Mudd: Just a minute. The question was: There is an Air National Guard of the United States. Now, 732 do you know whether there is or there isn't. If you don't know, say you don't know. If you know, just answer the question.

The Witness: I believe that the Air National Guard—Federally recognized units of the Air National Guard, I should say, constitute the Air National Guard of the United States.

Q. (By Mr. Galiher) Well, in your references then to that organization or in your references using the language that I have asked you about did you have reference to the Maryland Air National Guard or to the Air National Guard of the United States?

Mr. Mudd: Would you amend that to read "or either or both"?

Mr. Galiher: All right.

The Witness: When I refer to Maryland Air National Guard I refer to the—

Mr. Galiher: Excuse me. I don't think I put Maryland in. From time to time there have been references to Air National Guard.

The Witness: I am referring to those Air National Guard officers and units which are assigned and
733 Federally recognized by the United States.

Mr. Galiher: I think that's all.

Q. (By Mr. Wolcott) Colonel, I show you this paper which appears to be a photostat of a release and ask you if that is the form of passenger release that you were referring to in your prior testimony? A. It is, sir.

Q. And I believe that you testified that Private Chalmers signed such a release, is that right, sir? A. That's right.

Q. And does this appear to be a photostatic copy of the release that he signed? A. To the best of my knowledge it is a photostat of the release.

Mr. Wolcott: Would you mark that paper, please?

(Photostat was marked Passenger's Exhibit No. 15 for identification.)

Q. (By Mr. Wolcott) I refer you to the signatures on the lower right-hand side of Passenger Exhibit 15 and ask you if you recognize or identify any of those signatures?

A. You said lower right-hand, or lower left-hand?

734 Q. Lower right-hand, sir. I mean left-hand. A. Yes, I recognize all three.

Q. Could you read them off as they appear, reading from the top down? A. J. R. McCoy.

Q. Who is he? A. He is the Captain.

Q. That is Captain McCoy? A. Captain McCoy.

Q. All right. A. W. G. Zinkand.

Q. Can you identify him, please? A. He is an Air Technician clerk in Operations.

Q. Right. A. And the first name is not clear on the last one, but I believe it is—it is obscured. I can't make it out. It appears to be Vinson, who at that time I believe was also a clerk in operations.

Mr. Wolcott: Thank you, Colonel.

(Examination of witness concluded.)

735 Mr. Mudd: The signing, insofar as I am concerned, and the filing are waived, but I reserve the right to have the witness read over the transcript of the deposition before it is considered as approved.

Mr. Davidson: Mr. Pettibone, is the Government's position substantially the same?

Mr. Pettibone: Yes.

Mr. Davidson: All right. Agreeable with the passengers.

Plaintiff's Exhibit 15. National Guard Regulations No. 75-16

*NGR 75-16

National Guard Regulations No. 75-16

DEPARTMENT OF THE ARMY

Washington 25, D. C., 29 December 1947

ACCOUNTING CLERKS AND CARETAKERS

	Paragraph
Authority	1
Definitions	2
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Rates of pay	6
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Reports	9
Attendance at field training	10
Detached service	11
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Attendance of clerks and caretakers at military service schools (Air and Army)	13
Blank forms	14

* This pamphlet supersedes NGR 75-16, 5 August 1938, and NGR Circulars No. 6, 7 May 1938, No. 8, 30 August 1946, No. 6, 20 August 1946, No. 20, 28 November 1946, No. 4, 25 November 1947, and No. 23, 29 December 1947.

1. **Authority.**—Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of section 90, National Defense Act, for the administration and care of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau.

2. **Definitions.**—The following definitions are applicable:

a. Accounting clerks are male or female civilian employees authorized by law for accounting and property custodial duties in the office of the United States property and disbursing officer.

b. Caretakers (Army) are male civilian employees authorized as supervisors, mechanics, and technicians. They may be divided into two main categories.

— (1) *Unit caretakers.*—Employees who work directly under the supervision of a company or similar unit commander and are responsible to that commander for the care, maintenance, and repair of the unit equipment.

(2) *Pool maintenance caretakers.*—Employees who work in or from fixed shops, under the direction of shop or pool supervisors and under the general supervision of the State maintenance officer. They are responsible for the inspection, repair, and reconditioning of equipment pertaining to National Guard organizations.

c. Caretakers (Air) are male civilian employees authorized by law for maintenance, repair, and inspection of equipment issued to the National Guard Air units.

3. Number.—The number of accounting clerks and caretakers authorized to be paid from Federal funds in each State will be announced periodically by the Chief, National Guard Bureau. This number will be based on geographic considerations, troop strengths, the amount and types of equipment issued to the State, and upon funds made available for the National Guard. The number of personnel actually paid from Federal funds may exceed the total specified from time to time by the Chief, National Guard Bureau, if employment is on a part-time basis and funds allotted for each job are not exceeded.

4. Qualifications.—The several adjutants general will satisfy themselves that personnel paid from Federal funds are capable of performing the duties for which employed. The following qualifications are mandatory:

a. Accounting clerks must be able to perform the duties outlined in applicable Army job specifications and such additional duties, pertaining to the office of the United States property and disbursing officer, as may be assigned them.

b. Caretakers (Army).

(1) Unit caretakers must be members of the National Guard and of the unit for which employed. They must be qualified to perform maintenance, at the organizational level, on the equipment for which the unit commander will be responsible. Such qualifications will be determined by appropriate aptitude tests.

(2) Pool maintenance caretakers must be members of the National Guard and should be members of the parent unit of the pool to which they are assigned. If the appropriate MOS is not authorized in the parent

unit, caretakers may be enlisted in a related MOS for which they are qualified, or may be members of any other National Guard unit. They will be given appropriate aptitude tests, prior to employment, to establish their ability to perform the duties outlined in applicable Army or National Guard job specifications, as well as any additional duties pertaining to the reception, inspection, storage, issue, and maintenance of National Guard property, which may be assigned. Aptitude test forms have been furnished by the National Guard Bureau as a guide in the screening of applicants.

- (3) Commissioned officers may be employed as caretakers only in the supervisory positions listed below. Enlisted personnel will not be hired in these positions. Warrant officers will not be employed as the senior supervisor in any pool.

State maintenance officer.

Supervisor, artillery maintenance and repair.

Supervisor, automotive maintenance and repair.

Supervisor, engineer equipment and maintenance.

Supervisor, ordnance maintenance service.

Supervisor, signal maintenance and repair.

Supervisor, tank maintenance and repair.

c. Caretakers (Air) must be members of the National Guard and must be able to perform the duties specified for the particular job in AAF Manual 35-0-1 "Military Personnel, Classification and Duty Assignment," 3 April 1944 (as revised) or WD TM 12-427 "Military Occupational Classification of Enlisted Personnel," 12 July 1944 (as revised). However, they may be trained in additional duties as may be required by the unit commanders. Commissioned officers of the National Guard Air units may be employed as caretakers only in the Military Occupational Specialty positions indicated in current chart for Permanent Caretaker Detachment, National Guard Air units.

5. Travel.—Travel of accounting and caretaker personnel, essential to proper performance of their official duties, is authorized. Pertinent instructions will issue from the Chief, National Guard Bureau.

6. Rates of pay.—The maximum pay scale for accounting clerks and caretakers will be announced periodically by the Chief, National Guard Bureau. Actual rates of pay will be fixed by the several adjutants general within the limitations prescribed. Total payment from Federal funds will not exceed the allotment for that purpose, but supplemental payments may be made from other sources. No compensation will be paid from Federal funds for overtime work performed by accounting clerks and caretakers. Salaries paid to employees who are members of the National Guard will be in addition to any compensation authorized by law for members of the National Guard.

7. Payment.—a. Caretakers and accounting clerks will be paid monthly or semimonthly on Standard Form 1128 by the finance officer designated to pay National Guard vouchers for the State concerned.

b. Caretakers and accounting clerks will be listed under separate headings on pay rolls with job title of each individual stated below his name, followed by essential remarks. Two official or true copies of the order appointing an employee, showing job title and rate of pay, will be filed with the first pay roll on which he is paid. Two official or true copies of the order relieving an employee will be filed with the pay roll on which he is last paid. Whenever the job title and/or salary of an employee is changed, the change will be covered by an order showing the new title and/or the new salary, and two official or true copies of the order will be filed with the pay roll covering the first payment at the new rate.

c. Where pay data for all employees paid at a station cannot be entered on one copy of the Standard Form 1128,

additional copies may be used as continuation sheets. In such cases, page 1 of the pay roll will contain the necessary pay roll certifications and summary, with the continuation sheets securely fastened thereto. The original and two copies of the pay roll, together with the orders referred to in b above will be forwarded to the designated finance officer. After payment of the roll, the disbursing officer will enter complete voucher references and check numbers on the triplicate copy of the pay roll and return it to the certifying officer.

d. Pay rolls will be certified by the bonded United States property and disbursing officer and approved by the State adjutant general or an officer designated by him.

8. Funds.—The several adjutants general will submit quarterly requests to the Chief, National Guard Bureau for allotment of funds for pay of accounting clerks and caretakers, on WD NGB Form 42, "Request for Allotment of Funds for the Employment of Administrative, Clerical, Maintenance, and Custodial Personnel." Army and Air Force personnel will not be shown on the same sheet. Requests will be forwarded to reach the National Guard Bureau no later than the 15th day of the month next preceding the quarter for which funds are desired.

9. Reports.—Reports will be rendered monthly showing all employees paid from Federal funds, as of the first day of the month, on WD NGB Form 103, "National Guard Civilian Personnel." Army and Air Force personnel will not be shown on the same sheet. Reports will be forwarded to reach the National Guard Bureau no later than the 7th day of the month.

10. Attendance at field training.—Unless specifically authorized by the Chief, National Guard Bureau to remain at their home stations, caretakers will attend field training with their units. Requests for authority to remain at home stations must show what property is to be left, why it is

necessary to leave it, and why such property requires the attention of caretakers during the period of encampment.

11. Detached service.—When property assigned permanently to one unit is loaned to another unit, one or more caretakers from the responsible unit may accompany the property and remain with it to observe the care accorded it and to assist in its maintenance. Requests for this detached service will be submitted to the Chief, National Guard Bureau, in letter form listing the names and stations of the caretakers and the inclusive dates of the period of duty involved. When this duty is to be performed in connection with field training, the letter will be attached to the estimate for field training (WD NGB Form 39) to which the detached service pertains. When requests are approved by the Chief, National Guard Bureau, the State will issue the order placing the designated caretaker or caretakers on detached service. Orders will refer to paragraph 11, NGB 75-16, and the National Guard Bureau authorization, and will specify the number of days of detached service, together with the inclusive dates. When detached service is in connection with field training no per diem will be allowed. Within the limits of funds available, payment of travel expenses and per diem in connection with such detached service will be made from funds allotted to States for travel of accounting, custodial, and maintenance personnel.

12. Leave.¹—State adjutants general are authorized to grant accounting employees and caretakers annual leave, sick leave, and military leave (all with pay) in accordance with the provisions of *a*, *b*, *c*, and *d* below. They will maintain a record of all absences from official duty, the duration of each absence, and its cause.

¹ The provisions of paragraph 12 will not apply to accounting clerks and caretakers employed by the District of Columbia National Guard. The leave privileges of these employees are covered by Federal statutes which have been cited to the Adjutant General of the District of Columbia by separate instrument.

a. Annual leave.—Employees are entitled to 15 days annual leave with pay each calendar year. Annual leave is credited to the employee's leave account at the rate of 5 hours per pay period for employees paid bimonthly and 10 hours per pay period for employees paid monthly.

- (1) The minimum credit of annual leave is 5 hours and additional credits are in multiples of 5 hours.
- (2) Annual leave may be accumulated up to 30 days.

b. Sick leave.—Employees accrue sick leave at the rate of $1\frac{1}{4}$ days per month. The monthly accrual of sick leave will be credited to the employee's leave account at the beginning of the calendar month.

- (1) The minimum credit of sick leave is 5 hours and additional credits are in multiples of 5 hours.
- (2) Sick leave may be accumulated up to 15 days.

c. Military leave.—Military leave not to exceed 15 days will be granted to accounting clerks, who are also members of the National Guard, and to caretakers, for the purpose of attending annual field training of the units to which they are assigned. Such leave will be granted without prejudice to their pay as accounting clerks and caretakers or their pay as members of the National Guard. In this respect their status will correspond to that of Federal employees who are also members of the National Guard.

d. Miscellaneous provisions.—

- (1) Leave accrues to an employee while in a leave with or without pay status, provided he returns to duty, or provided failure to return to duty is due to death, disability, retirement for disability, or reduction in force. Evidence of disability must be supported by an acceptable medical certificate.
- (2) Leave credits will be reduced when an employee's total absence in a nonpay status during a calendar

year equals or exceeds 88 hours. The reductions are at the rate of 5 hours annual leave, and 5 hours sick leave, for each such period. When an employee absent because of injury received in line of duty requests that he be carried on leave without pay, he is entitled, upon his return to duty, to receive credit for accrued leave covering the period for which he was paid disability compensation by the Bureau of Employees' Compensation.

- (3) The value of the leave credit day is established at 8 hours, irrespective of the number of hours worked a day.
- (4) The leave year for purposes of this authority commences for each individual with the date of employment.
- (5) When an employee's services are to be terminated, every effort will be made to allow him to take any accrued annual leave.
- (6) Leave accumulated in excess of amounts stipulated in *a* and *b* above will be automatically forfeited.
- (7) Cash settlement of accrued leave is not authorized.
- (8) Absent time on holidays, or at any time other than the hours of work prescribed by the adjutant general, need not be charged to leave.
- (9) Sick leave not to exceed 15 days may, in the discretion of the State adjutant general, be advanced. Such advances will be made only after all accrued annual and sick leave have been used, and will be charged against future accruals of sick leave. Any amount not covered by accruals at time of separation will be deducted on final pay roll settlement.

13. Attendance of clerks and caretakers at military service schools (Air and Army).—*a*. Members of the

National Guard employed as clerks or caretakers by the States, and paid from National Guard funds, are authorized to attend military service schools and to participate in courses of practical instruction at specified military installations, without prejudice to their civilian pay. The following will apply:

- (1) The applicant must be a member of a federally recognized National Guard unit.
- (2) Leave of absence will be granted for a period not to exceed 90 days. While absent, the student, if an enlisted man, will be counted as constructively present for purposes of determining percentage of drill attendance for his unit. Specific authority for leave of absence for a period in excess of 90 days will be requested from the Chief, National Guard Bureau, in those instances in which the course of instruction exceeds 90 days.
- (3) In general, no replacement will be provided in civilian and military vacancy while the individual is away from home station. In exceptional cases requests for temporary replacements in Air units with full justification therefor may be submitted to the Chief, National Guard Bureau. In cases affecting Army units, the employment of substitute personnel to replace individuals attending service schools under the provisions of this regulation will *not* be authorized.
- (4) Generally, attendance will be in a civilian status. While in attendance National Guard personnel will be subsisted and quartered in accommodations with their National Guard rank or grade or as may be prescribed by the local post or base commander concerned. The United States Air Force requires attendance in uniform at United States Air Force schools.
- (5) The adjutant general of the State concerned, on authority of the Chief, National Guard Bureau, will

issue orders for the student, as a civilian or as otherwise authorized, to proceed on temporary duty to the installation providing the instruction, and upon completion or when otherwise relieved by the commandant or the commanding officer to return to proper station.

- (6) The United States property and disbursing officer of the State concerned will make arrangements for travel and for the payment of civilian wage and the prescribed per diem.
- (7) The per diem rate will be \$6.00 for each day or part thereof the individual is in a travel status.
- (8) When in attendance in a civilian status the per diem rate for days actually at the installation providing instruction will be in the amount required to meet actual expenses for meals, quarters, including service charges, and may not exceed \$4.00 per day. If attending in a military status, the per diem will be as prescribed in pertinent regulations.
- (9) The individual will pay for the necessary subsistence and quarters at the rates prescribed by the commander of the installation where he is in attendance.
- (10) Applications for authority to attend these schools will be processed in the same manner as applications for any other individual to attend a military service school.
- (11) An employee selected to attend any of these courses of instruction, if an enlisted man, will be discharged and reenlisted prior to acceptance of such detail.
- (12) Personnel attending these schools will be entitled to the same benefits under the Federal Compensation Act as they now enjoy.

b. Adjutants general will make every effort to select qualified employees and appropriate courses to insure maxi-

num benefits in increased efficiency of operation. [CSGOT 300.3 (NGB Cir (24 Dec 47)).]

14. Blank forms.—The following is a list of the blank forms referred to in these National Guard Regulations. The list shows the number and title of each form and the paragraphs of this NGR dealing with the form. The following NGB forms are obtainable from the National Guard Bureau. The Standard Form may be obtained from The Adjutant General.

Number of form	Title of form	Reference (pg.)
Standard Form 1128	Pay Roll for Personal Services	7
WD NGB Form 39	Estimate for Field Training (Fund)	11
WD NGB Form 42	Request for Allotment of Funds for the Employment of Ad- ministrative, Clerical, Main- tenance, and Custodial Per- sonnel	8
WD NGB Form 103	National Guard Civilian Per- sonnel	9

[CSUSA 325 (28 Aug 47)]

By Order of the Secretary of the Army:

KENNETH F. CRAMER

Major General

Chief, National Guard Bureau

NGR 75-16

ACCOUNTING CLERKS AND CARETAKERS

Department of the Army
Washington 25, D. C. 16 April 1948

Change No. 1

NGR 75-16, 29 December 1947, is changed as follows:

1. *Authority.*—Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of section 90, National Defense Act, for the administration and care of materiel, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours, and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau.

[CSGSP/B1 15628]

12. *Leave.*¹—State adjutants general are authorized to grant accounting employees and caretakers annual leave, sick leave, and military leave (all with pay) in accordance with the provisions of *a, b, c, and d* below. They will maintain a record of all absences from official duty, the duration of each absence, and its cause.

• • • • •
d. Miscellaneous provisions.
• • • • •

(7) Cash settlement of accrued leave is not authorized

with the exception of claims for accrued leave due
a deceased employee.

[CSGSP/B1 14615]

By Order of the Secretary of the Army:

KENNETH F. CRAMER
Major General
Chief, National Guard Bureau

Plaintiff's Exhibit 16, National Guard Regulations No. 75-16

(Superseded)

*NGR 75-16

NATIONAL GUARD REGULATIONS }
No. 75-16

DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., 7 January 1953

FIELD CIVILIAN PERSONNEL

	Paragraph
Purpose	1
Authority	2
Definitions	3
Number to be employed	4
Qualifications	5
Appointment of personnel	6
Place of employment	7
Travel	8
Rates of Pay	9
Part-time employment	10
Payment	11
Funds	12

* These regulations supersede NGR 75-16, 29 December 1947, including C 1, 16 April 1948; C 3, 3 February 1950, and C 3, 1 March 1950; and NGB Circulars No. 4, 1950, No. 3 and No. 5, 1951.

Reports	13
Training	14
Temporary duty	15
Leave	16
Attendance at service schools	17
Restoration of employees after a period of active military service with the armed forces of the United States	18

1. Purpose.—The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel (hereinafter referred to collectively as "National Guard civilian personnel"): administrative assistants; accounting clerks; maintenance personnel; range-keepers; and administrative, supply and maintenance technicians, and to prescribe the procedure for the payment of these individuals.

2. Authority.—National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance, repair and inspection of materiel, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U. S. C. A. 42 and 42a; G. O. No. 96, Dept. of the Army, 9-Nov 51.)

3. Definitions.—The following definitions are applicable:

a. Administrative assistants are federally recognized officers, warrant officers or enlisted men employed as civilians to act as civilian administrative assistants to

commanders in the performance of such duties, responsibilities and administrative matters for which the commanders are responsible, or may be required to perform.

b. Accounting clerks are male or female civilian employees authorized by law for accounting and property custodial duties in the office of the United States Property and Disbursing Officer.

NGR 75-16

*C 3

Changes now in force: C 3

FIELD CIVILIAN PERSONNEL

DEPARTMENT OF THE ARMY

WASHINGTON 25, D. C., 17 February 1955

CHANGES

No. 3

NGR 75-16, 7 January 1953, is changed as follows:

5. Qualifications.—The adjutants general * * * qualifications are mandatory:

c. (1) * * * (As added by Changes No. 1) In event of emergency (order to active duty of the parent unit, etc.), the Chief, National Guard Bureau, may waive the requirement that pool maintenance employees must be members of the National Guard.

(4) (As added by Changes No. 1) Commissioned officers may be employed as pool maintenance employees in the position of Repairman, Radar Reporting Equipment.

* These changes supersede C 1, 19 October 1953, and C 2, 19 November 1954, to NGR 75-16.

7. Place of employment.—National Guard civilian * * *
than Federal funds.

d. (As superseded by Changes No. 1) Accounting, clerical, and custodial employees are authorized for the office of the USP&FO, equipment concentration sites, and for the office of the State maintenance officer.

16. (Superseded) Leave.—Leave not to exceed that authorized below may be granted to National Guard civilian personnel. A record of absences from official duty, the duration of each absence, and as cause, will be maintained by each State.

Note.—The provisions of this paragraph will not apply to personnel employed under these regulations by the District of Columbia National Guard. The leave privileges of these employees are covered by Federal statutes which have been cited to the Adjutant General of the District of Columbia by separate instrument. The provisions of this paragraph do not apply to temporary civilian employees of the National Guard.

a. Annual leave.

- (1) Annual leave is accrued at the rate of 5 hours per pay period if paid semimonthly, or 10 hours per pay period if paid monthly.
- (2) The minimum credit of annual leave is 5 hours and additional credits are in multiples of 5 hours.
- (3) Annual leave may be accrued in excess of 240 hours but no more than 240 hours may be carried forward from one calendar year to the next.
- (4) Annual leave will be credited at the end of the pay period.

b. Sick leave.

- (1) Sick leave is accrued at the rate of 5 hours per pay period if paid semimonthly or 10 hours per pay period if paid monthly.
- (2) The minimum credit of sick leave is 5 hours and additional credits are in multiples of 5 hours.
- (3) Sick leave will be credited at the end of the pay period.
- (4) Sick leave accruing to an employee's credit which is not used during the year in which it is earned may accumulate from pay period to pay

* * * * *

service, would be otherwise eligible and qualified for restoration, the State adjutant general should request the appropriate State authorities to place such an employee in some other suitable State position.

- (7) When two persons are eligible and qualified for the same position, it is recommended that the employee entering the active military service with the unit concerned be given preference in restoration to employment.

[NG—AREXP 325.1 (NGR 75-16) Gen (15 Aug 52).]

BY ORDER OF THE SECRETARY OF THE ARMY:

Official:

DAVID S. RUMBROUGH
Colonel, NGB
Executive
National Guard Bureau

RAYMOND H. FLEMING
Major General
Chief, National Guard Bureau

Plaintiff's Exhibit 17, ANGR 40-01

Air National Guard Regulation No. 40-01B

ANGR 40-01B

10

Department of the Air Force
Washington, 20 May 1955

CIVILIAN PERSONNEL

AIR NATIONAL GUARD PERSONNEL

ANGR 40-01, 20 December 1954, is changed as follows:

Delete paragraph 10. b. (9) and substitute the following:

10. Pay and Per Diem:

* * * *

b. Per Diem:

* * * *

- (9) Air National Guard civilian personnel authorized to attend approved supplemental exercises where government messing facilities are not available shall be entitled to an allowance of not to exceed 85¢ for each meal to which entitled while participating in the exercise. At installations where government messing facilities are available these personnel may be authorized an allowance for subsistence of not to exceed \$1.60 per day. From this allowance individuals are expected to purchase meals at the rate applicable for officers not in a per diem status. In all instances where meals are furnished these personnel free of charge, no reimbursement for subsistence is authorized. If the exercise is of such duration that quarters are required but government quarters are not avail-

able, an allowance of not to exceed \$3.50 per day may be paid.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

OFFICIAL:

T. H. BAXTER
Colonel, USAF
Executive
National Guard Bureau.

DISTRIBUTION:

"B"

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

Air National Guard Regulation No. 40-01A

ANGR 40-01A

10

Department of the Air Force
Washington, 15 February 1956

CIVILIAN PERSONNEL

AIR NATIONAL GUARD CIVILIAN PERSONNEL

ANGR 40-01, dated 20 December 1954, is changed as follows:

Add the following subparagraph to paragraph 10:

10. Pay and Per Diem:

f. Claims—Deceased Air Technicians:

- (1) Claims for pay and/or allowances due deceased air technicians will be forwarded to the National Guard Bureau for review and submission to the United States General Accounting Office for settle-

ment. Outstanding United States Treasury checks which may have been issued but not cashed by the decedent are to be inclosed with the claims.

(2) Preparation of Claim and Supporting Documents:

- (a) Standard Form 1055, "Claim Against the United States for Amounts Due in the Case of a Decedent," (one copy) will be prepared. When a legally appointed representative of the estate of the decedent is filing the claim, a certificate of letters testamentary or of administration must accompany the claim.
- (b) The same pay roll or voucher form (four copies) which would be used for payments under normal circumstances will be prepared. The name, address, and capacity of the payee will be left blank. A determination of eligible payee will be made by the United States General Accounting Office, from information furnished, at which time the payee block of the pay roll or voucher will be completed.
- (c) The pay roll will be submitted in four copies and will include the following information as appropriate.
 1. Certification of funds if payment is to be made from current appropriations.
 2. Amount of unused leave credit at date of death. If none, so indicate.
 3. Pay periods and rate of pay.
 4. Date of which last paid and in what Finance Officer's accounts (month, name, and symbol number).
 5. Date of death.

6. If claim is for travel or per diem allowances, include copies of orders under which travel was performed together with a complete itinerary.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

OFFICIAL:

THURSTON H. BAXTER :
Colonel, USAF
Executive
National Guard Bureau

DISTRIBUTION:

"B"

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

Air National Guard Regulation No. 40-01

40-01A 15 Feb.

40-01B 20 May

* ANGR 40-01

1-2

Department of the Air Force
Washington, 20 December 1954

CIVILIAN PERSONNEL

AIR NATIONAL GUARD CIVILIAN PERSONNEL

SECTION I—GENERAL

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* This Regulation supersedes ANGR 40-01, 7 July 1952, and ANGR 40-01A, 22 September 1953.

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SECTION I—GENERAL

1. Purpose. This Regulation provides a manning guide for the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel.

2. Policy:

a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

c. Officers will not be appointed to Air National Guard civilian personnel positions authorized for airmen, nor will airmen be appointed to positions authorized for officers.

d. The authorized grade and position titles may not be altered or changed.

e. Airmen type air technician positions may be transferred to other units or organizations, or the position may be changed to another authorized position at the discretion of the State adjutant general, except that such positions may not be transferred to or from Headquarters, State Air National Guard without prior approval of the Chief, National Guard Bureau.

f. Officer type air technician positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau.

g. Air National Guard technician positions will not be transferred to Army National Guard units.

h. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with the performance of their Air National Guard civilian duties.

i. Air National Guard civilian personnel will occupy the T/O vacancy most comparable to their civilian position.

j. Warrant officers will be considered to be in the same category as commissioned officers in this regulation.

k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recognition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

l. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in special orders and other official action.

3. Authority:

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau.

4. Status. Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp Gen Dec. 305).

5. Definitions. For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) "Air technician" means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians.

(2) "Temporary employees" means and includes persons employed for a temporary period for the performance of duties of positions which are not listed on the manning guide and who are not paid from funds designated for the pay of air technicians.

(3) "Temporary air technicians" means and includes personnel employed for a period of 90 days or less for the performance of duties listed on the manning guide and paid from funds designated for the pay of air technicians.

b. "Air National Guard civilian detachment" means and includes the Air National Guard civilian personnel of any unit, organization, office, base, or installation.

c. "Man day" is a unit of measure meaning the employment of one person for one day.

d. "Man month" is a unit of measure meaning the employment of one person for one month, two persons for fifteen days, or three persons for ten days; etc.

e. "Man years" is a unit of measure meaning the employment of one person for one year, two persons for six months, or three persons for four months, etc.

f. "Special project" means a specific job or mission identified by title.

6. Qualifications. Air National Guard civilian personnel shall be qualified as follows:

a. Technically qualified to perform the duties of the position for which being employed without further schooling or training at the expense of the government; *and*

b. Physically qualified for active Federal service if the position for which employed requires membership in the Air National Guard.

7. Appointment:

a. *Authority.* Appointment of Air National Guard civilian personnel is a function of the adjutant general.

Defendant's Exhibit 1, General Orders

MILITARY DEPARTMENT

STATE OF MARYLAND

OFFICE OF THE ADJUTANT GENERAL

FIFTH REGIMENT ARMORY

BALTIMORE

General Orders
Number 47

5 August 1956
Section

III. The National Guard Bureau has extended Federal recognition to following officers of the Maryland National Guard effective dates indicated:

Capt Julius R. McCoy, AF, 104th Ftr Intep sq 1 Jul 56

By Order of the Governor:

MILTON A. RECKORD
Major General
The Adjutant General

Official:

STATE OF MARYLAND
MILITARY DEPARTMENT
FIFTH REGIMENT ARMORY
BALTIMORE

General Orders
No. 24

31 March 1952
Section

• • • • •

II. The National Guard Bureau, Department of the Army, extends federal recognition to the following named officer of the Maryland National Guard, effective from the date indicated:

2nd Lt Julius Rossey McCoy, AF,
(assigned Pilot, 104th Fighter Sq),
to date from 25 January 1952.

By Order of The Governor:

MILTON A. RECKORD
Major General
The Adjutant General

Official:

STATE OF MARYLAND
MILITARY DEPARTMENT
FIFTH REGIMENT ARMORY
BALTIMORE

General Orders
No. 9

31 January 1952
Section

• • • • •

I. The following appointments and assignments in the Maryland National Guard have been made and commissions issued accordingly:

• • • • •

(d) Julius R. McCoy, 0784050, Esq., Baltimore City,
to be

2d Lieutenant, Air Force

with rank from 25 January 1952

The officers named above are assigned to duty as follows:
104th Fighter Sq: Lt McCoy as Pilot

By Order of The Governor:

MILTON A. RECKORD
Major General
The Adjutant General

Official:

A Certified True Copy
MILLARD F. HAMBLIN, JR.
Millard F. Hamblin, Jr.
Captain, USAF
Acft Acdt Board Recorder

Defendant's Exhibit 2, Special Order No. 93

STATE OF MARYLAND
OFFICE OF THE ADJUTANT GENERAL
FIFTH REGIMENT ARMORY
BALTIMORE

Special Orders
WR. 93

13 May 1958

EXTRACT

4. PAC in ANGR 40-01 as amended, and letter NO-AFSTP (With inclosures) dated 21 March 1958, Subject: "Air National Guard Civilian Personnel Program", the Air Technician positions of the following named Air Technicians, 104th Fighter-Interceptor Squadron MDAFNG, are changed as follows, effective 16 May 1958:

Name of Air Technician	From	To
Julius R. McCoy	Base Maint Supervisor NGC-11 S2 eff 16 Dec 57 line 75, ATD Man Doc	Acft Maintenance Chief NOMS-9, 83 eff 16 May 58 line 74, ATD Man Doc

Official:

/s/ Benjamin F. Cassell

/t/ BENJAMIN F. CASSELL

*Colonel, AGC, MdARNG-Assistant**Distribution:-**C/S MdANG (5)**Cmdr, 104th FIS (140)**"A Certified True Extract Copy"**GEORGE J. WINDISH**George J. Windish**Captain, MdANG**Adjutant***By Order of the Governor****MILTON A. RECKORD***Major General**The Adjutant General**Asst USP&FO (Fiscal) Air (10) USP&FO (39)**Asst USP&FO (Prop) Air (10) Files (29)***Defendant's Exhibit 3. Local Flying Area S.O.P. No. 3****OFFICE OF THE OPERATIONS OFFICER****104TH FIGHTER-INTERCEPTOR SQUADRON****MARYLAND AIR NATIONAL GUARD****HARBOR FIELD, BALTIMORE, MD.****2 January 1957****STANDING OPERATING PROCEDURE
NUMBER 3****LOCAL FLYING AREA**

1. Purpose: To establish the *Local Flying Area* and the *Acrobatic and Test Flight Areas* to be used by this unit.

2. Scope: The provisions of this S.O.P. are applicable to all pilots flying aircraft assigned or attached to this organization.

3. *Local Flying Area*: All Local Flights in aircraft assigned to this unit will be confined to an area within a

radius of 100 nautical miles from the home base. The Local Flying Area is outlined for visual reference on the Local Area Map in the briefing room. The boundaries are as follows: From Selinsgrove, Pa. on the North, Southeast to McGuire AFB, South to Atlantic City, N. J., thence along the coast of the Delmarva Peninsula to Chincoteague N.A.S., West to Tappahannock, Va., Northwest to Front Royal, Va., thence Northeast to Martinsburg, Chambersburg and Selinsgrove, Pa.

- a. Aircraft assigned to this unit will not be flown over the cities of Baltimore and Washington below 10,000 feet unless it becomes necessary to do so in a practice or actual instrument approach, or if on a specifically briefed mission.

4. *Acrobatic Area*: All *Acrobatic Flights* will be confined to the *Acrobatic Area* as outlined on the Local Area Map in the briefing room. Acrobatic Flights will never be performed on airways or over cities, towns, or assemblies of people, nor will they be performed below 5000 feet mean sea level. At no time will acrobatics be flown in other than the *Acrobatic Area* unless specifically briefed by the Commander or his authorized representatives. The boundary of the Acrobatic Area is as follows: The Northern boundary is Airway Red 73 to Red 72 on the East to Green 5 on the Southeast to Red 17 on the South and along the Eastern edge of the Aberdeen Danger Area on the West.

5. *Flight Test Area*: All Engineering Test Flights will be accomplished within the Flight Test Area, which is outlined for visual reference on the Local Area Map in the briefing room. The Flight Test Area is bounded by Friendship International Airport, the Glenn L. Martin Co. Airport, Patuxent Naval Air Station, and Andrews Air Force Base.

This is a Certified True Copy

JOHN D. WEBB, JR.

John D. Webb, Jr.

Major, USAF

Defendant's Exhibit 4-Passenger in Aircraft, S.O.P. No. 9

OFFICE OF THE OPERATIONS OFFICER
104TH FIGHTER INTERCEPTOR SQUADRON
.. MARYLAND AIR NATIONAL GUARD
HARBOR FIELD, BALTIMORE, MD.

16 January 1957

Standing Operating Procedure }
Number 9 }

PASSENGERS IN AIRCRAFT

1. *Purpose & Scope:* This S.O.P. establishes the policy of this unit regarding passengers and is applicable to *ALL* personnel who fly as passengers in aircraft assigned or attached to this unit.

2. It will be the pilot's responsibility to brief all crew members and/or passengers on the following:

- a. Proper fit and utilization of emergency equipment (parachute, mae-west, crash helmet, oxygen mask, etc.).
- b. Signals to be used for bail-out or ejection.
- c. Emergency exits and duties of crew members during an emergency.

3. All passengers who are not on flying status will execute a release, which will be filed in Operations.

4. Passengers in jet aircraft will not be flown above eighteen thousand (18,000) feet *mean sea level* unless they have been through the altitude indoctrination chamber.

5. Pilots with less than ten (10) hours first pilot time in the type aircraft concerned, *will not* be permitted to take up passengers.

6. Personnel who are not members of this unit will not ride as passengers without permission of the Commander.

By Order of the Commander:

JOSEPH J. MAISCH, JR.
Captain, Md ANG
Operations Officer

A Certified True Copy

MILLARD F. HAMBLIN, JR.
 Millard F. Hamblin, Jr.
Captain, USAF
Acft Acdt Board Recorder

Defendant's Exhibit 5. Local Clearance. S.O.P. No. 18

OFFICE OF THE OPERATIONS OFFICER
 104TH FIGHTER INTERCEPTOR SQUADRON
 MARYLAND AIR NATIONAL GUARD
 BALTIMORE, MARYLAND

25 January 1957

Standing Operating Procedure }
 Number 18 }

LOCAL CLEARANCES

1. *Purpose & Scope:* This S.O.P. establishes local clearance (AF Form 113) procedures, and applies to all pilots flying aircraft assigned or attached to this organization.

2. All local flights will be monitored by use of the AF Form 113, Local Flight Clearance.

3. The following named officers are authorized to sign as clearing authority on this form:

Commander, 104th Fighter-Interceptor Squadron.
 Operations Officer, 104th Fighter-Interceptor Squadron.

Flight Commanders, 104th Fighter-Interceptor
Squadron.

Base Operations Officer.

Designated Operations Duty Officer.

By Order of the Commander:

JOSEPH J. MAISCH, JR.

Captain, Md ANG

Operations Officer

Defendant's Exhibit 7, AFR 45-2

*AFR 45-2

1-3

DEPARTMENTS OF THE ARMY AND
THE AIR FORCE

WASHINGTON 25, D. C., 13 April 1949

ARMY REGULATIONS

No. 130-5

AIR FORCE REGULATION

No. 46-2

NATIONAL GUARD

GENERAL PROVISIONS

Paragraph

Authority	1
General	2
Responsibilities of Chief, National Guard Bureau	3
National Guard Bureau Regulations	4

1. Authority.—*a.* National Security Act of 1947 (Public Law 253—80th Cong., WD Bul. 11, 1947).

b. Transfer Order 10 (JAAF Bul. 12, 1948), National Military Establishment.

c. JAAFAR 1-11-20. 1948. as changed.

* These regulations supersedes WD General Orders 4, 1961.

2. General.—*a. Army National Guard.*—The National Guard Bureau is charged with administering approved Department of the Army policies other than those relative to training, for the Army National Guard not in the Federal service and with promulgating Department of the Army directives and regulations applicable to the Army National Guard, including those relating to training.

b. Air National Guard.—The National Guard Bureau is charged with administering approved Department of the Air Force policies other than those relative to training, for the Air National Guard not in the Federal service, and with promulgating Department of the Air Force directives and regulations applicable to the Air National Guard, including those relative to training.

c. Joint policies.—The National Guard Bureau is charged with administering approved joint Army and Air Force policies other than those relative to training, when such policies are applicable to both Army National Guard not in the Federal service and the Air National Guard not in the Federal service, and with promulgating joint Army-Air Force directives and regulations applicable to both the Army National Guard and the Air National Guard, including those relating to training.

d. Communication.—The National Guard Bureau is the channel of communication between the Departments of the Army and the Air Force and the several States, Territories, and the District of Columbia on all matters pertaining to the Army National Guard and the Air National Guard.

e. Records.—The National Guard Bureau is the office of record of Department of the Army and Department of the Air Force records of the Army National Guard and Air National Guard not in the Federal service.

3. Responsibilities of Chief, National Guard Bureau.—

a. The Chief of the National Guard Bureau is responsible to—

- (1) The Chief of Staff, United States Army, for all matters pertaining to the Army National Guard:
- (2) The Chief of Staff, United States Air Force, for all matters pertaining to the Air National Guard.
- (3) Jointly to the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force, for all matters pertaining to both the Army National Guard and the Air National Guard.

b. The Chief of the National Guard Bureau is responsible for—

- (1) The proper organization of the National Guard Bureau, which shall include an Army Division and an Air Force Division, together with necessary administrative and executive offices.
- (2) Efficient administration of the functions of the National Guard Bureau as outlined in paragraph 2.
- (3) Submission to the Chiefs of Staff of such proposals for changes in existing policies, regulations, and laws as appear desirable to him.
- (4) The maintenance of mutual understanding and cordial relations between the Departments of the Army and the Air Force, and the Governors, military officials, and National Guard of the several States, Territories, and the District of Columbia.

4. National Guard Bureau Regulations.—*a.* The National Guard Bureau will, from time to time, publish joint National Guard Regulations when such regulations are applicable to both the Army and Air National Guard, or separate National Guard Regulations when such regulations are applicable to the Army National Guard only or to the Air National Guard. National Guard Regulations will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regu-

lations or Air Force Regulations govern the Regular components of the service.

b. Joint National Guard Regulations will be issued subject to the approval of the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force. National Guard Regulations pertaining to the Army National Guard only will be issued subject to the approval of the Chief of Staff, United States Army. National Guard Regulations pertaining to the Air National Guard only will be issued subject to the approval of the Chief of Staff, United States Air Force.

c. The Chief, National Guard Bureau is authorized, within the limitations imposed by law, to issue such other publications pertaining to the Army or to the Air National Guard when not in Federal service, as he may deem advisable or necessary, provided that such publications are pursuant to approved policy of the appropriate service or are specifically approved by the Chief of Staff of the appropriate service.

[AG 323 (31 Mar 49)]

BY ORDER OF THE SECRETARIES OF THE ARMY AND THE AIR FORCE:

OMAR N. BRADLEY

Chief of Staff, United States Army

Official:

EDWARD F. WITSELL

Major General

The Adjutant General

HOYT S. VANDENBERG

Chief of Staff, United States Air Force.

Official:

L. L. JUDGE

Colonel, USAF

Air Adjutant General

Distribution:**Army:**

C,

For explanation of distribution formula, see SR310 90-1

Air Force:

D. G.

For explanation of distribution formula, see AFR5-4.

Defendant's Exhibit 9, ANGR 50-01

*ANGR 50-01

1-2

DEPARTMENT OF THE AIR FORCE
WASHINGTON 25, D. C., 27 NOVEMBER 1950

AIR NATIONAL GUARD REGULATION }
No. 50-01

TRAINING
GENERAL

Paragraph

Training Authority	1
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Training Objectives	3
Training Programs and Schedules	4
Responsibility and Duties of Unit Commanders	5
Supervision of Training	6
Aerial Flights and Aviation Accidents	7
Hospitalization and Burial	8
Inter-Service Training of Civilian Component	
Personnel	9

1. *Training authority.* The requirements to be met and the sources of authority for the training and instruction

* This regulation, together with ANGR's 50-02, 50-03, and 50-04 supersede NGR 45, dated 30 Nov 46, and NGB Cir's 9, 14, and 17, 1949, for the Air National Guard.

of the Air National Guard not in Federal service are set forth in the following:

a. Sections 5, 91, 92, 93, 94, 96, 97, and 99, National Defense Act, as amended, and Sections 201 and 501, Public Law 351, 81st Congress, hereafter referred to as Career Compensation Act of 1949.

b. Air National Guard Regulations.

c. The policies of the Department of the Air Force.

d. The orders, instruction, and training announcements issued by the Chief of Staff, United States Air Force pursuant to authority specifically delegated to him by the Secretary of the Air Force.

e. The orders and detailed instructions promulgated by the Chief, National Guard Bureau to the Air National Guard not in Federal service with the approval of the Chief of Staff, United States Air Force, in amplification of, and to make effective, the policies indicated in c above.

2. *National Guard Bureau Instructions.* The Chief, National Guard Bureau is charged with promulgating to the Air National Guard not in Federal service, from time to time, the necessary orders and instructions to make effective the Department of the Air Force training policies.

a. The training of the Air National Guard will conform to the Department of the Air Force policies and directives as prescribed for the Regular Air Force.

b. It will be conducted by the Air National Guard organizations of the respective States under the supervision of the commanding generals of the appropriate major forces, in accordance with the policies prescribed by the Department of the Air Force. Such supervision will be exercised by:

(1) Preparation of training directives.

(2) Supervision of United States Air Force Instructors.

- (3) Authority to conduct inspections.
- (4) Conduct of tests.
- (5) Furnishing the Department of the Air Force with appropriate reports on state of training and recommendations for necessary remedial actions.

3. *Training Objectives.* Training objectives will be established by State authorities and Air National Guard high commanders in accordance with the principles defined in appropriate training publications and with the policies, directives, and announcements of higher authority. These objectives will conform to the following general requirements:

a. *Individual:*

- (1) To develop and qualify personnel in all grades to perform all duties which reasonably may be assigned to them both in peace and for mobilization.
- (2) To develop personnel who can be utilized as instructors.
- (3) To develop personnel capable of applying the most up-to-date technique in the use of equipment assigned.
- (4) To maintain such standards of mental and physical fitness necessary for active field service.
- (5) To develop leadership in those individuals who display a willingness to assume responsibility.

b. *Unit:*

- (1) To insure that all units will be capable of immediate mobilization and field service with a minimum of time required for field training prior to commitment to actual combat operations.
- (2) In addition to its employment as a separate unit, to be capable of integration into any command in which

units of that type reasonably can be expected to be employed.

c. *Additional Objectives for Officers.* In addition to the above, special objectives for Air National Guard officers will be:

- (1) To prepare, by progressive selection and training, officers to assume command and staff responsibilities of all echelons up to and including the highest levels.
- (2) To prepare those individuals who possess particular aptitude for special or technical assignments in Air National Guard units and to make available the necessary facilities for the development of such individuals' military skills and knowledge.

4. *Training Programs and Schedules.* Training directives will be prepared by United States Air Force. When necessary to implement these directives, the Chief, National Guard Bureau will furnish training programs for all units. Training schedules are prepared by unit commanders only for such training as is to be conducted under their personal direction. Training programs and schedules will be prepared in accordance with the principles defined in appropriate training publications and the training programs of higher authority.

5. *Responsibility and Duties of Unit Commanders.* Training is a function of command, and each commander, is responsible for the military discipline, health, morale, technical and tactical proficiency of his command, including personnel attached thereto by competent authority. While the assistance of the Air Force instructors should be utilized to the fullest extent, their presence and assistance will not relieve organization and unit commanders of personal responsibility for the training of their commands. The commanding officer of a unit is charged with those duties incidental to the training of his unit, not only as a unit but

of the individuals thereof, including the appearance, discipline, and the care and preservation of property. He is also responsible for the proper performance of all duties connected with the administration of his unit, including its pay, clothing, accounts, reports, and returns. In the absence of its commanding officer the command of the unit devolves upon the officer next in rank, eligible to command, who is serving with it unless otherwise specifically directed by higher authority.

6. *Supervision of Training.*

a. *General.* Each Air Force commander is charged with the supervision within his area of all unit training assemblies and field training and of certain classes of supplemental training indicated in ANGR 50-04. The Air Force commanders will make certain that in the supervision of training proper coordination with the State authorities will be made.

b. *Use of Air Force Instructors.* The services of the instructor personnel will be utilized in the supervising execution of all details incidental to making effective the provisions of the Air Force training announcements, except that instructors will not be detailed as Federal inspectors of any unit or organization of the Air National Guard.

c. *Command.* Command is exercised by virtue of office and the special assignment of officers holding military rank who are eligible by law to exercise such command. In time of peace, the right of command within the Air National Guard rests within the Governor of the State and is exercised through the Adjutant General and the individual officers appointed and commissioned in the Air National Guard of the State concerned. Except when ordered to active Federal service by competent authority, the Air National Guard is not legally under the command jurisdiction of officers of the United States Air Force; neither is

the Air National Guard of a State legally subject to orders from an Air National Guard officer from another State.

d. The efficient and effective training of the Air National Guard while under State control requires the highest degree of cooperation and coordination between all echelons of command regardless of State boundaries or other legal barriers, in order to properly train the Air National Guard for its Federal mission. Such cooperation and coordination can be obtained only through a clearly defined channel for control for training purposes. To this end the following training policies are promulgated with the concurrence of the military authorities of the several States, Territories, and the District of Columbia.

- (1) On all matters pertaining to operations for training in preparation of Air National Guard units for the discharge of their Federal mission, the Chief of Staff, USAF, through his designated commanders, may exercise training supervision as differentiated from command jurisdiction over Air National Guard units by means of normal military channels.
- (2) Commanders of Air National Guard organizations who by virtue of assignment and rank, would be eligible to command when on active duty, may exercise training supervision over subordinate units and personnel within their respective organizations in all matters pertaining to training for their Federal mission, regardless of whether or not subordinate units and personnel are assigned to the same State in which the commander is commissioned.
- (3) In conformity with the policy enunciated in the foregoing subparagraphs and in order that wing, group, squadrons, and other headquarters organizations and personnel of the Air National Guard may receive training in the utilization of normal tactical channels of communication and operations, and in

order that they may be cognizant of the state of organization and training of units which would be subordinate to them in Federal service even though such units are beyond the confines of the State within which such headquarters are located, the following procedure will be effected:

- (a) All correspondence affecting the training and operations, as applied to preparation for readiness for Federal mission, will be forwarded through normal tactical channels of communication, inside or outside the State, with additional copies plainly marked for each intermediate headquarters up to and including wing headquarters.
- (b) Information copies of all communications, instructions, orders or directives and copies of reports issued pursuant to this policy will be transmitted through normal administrative channels to the Adjutant General of all States involved and to the Chief, National Guard Bureau.

7. *Aerial Flights and Aviation Accidents.* For definitions see NGR 58 (pending publication of ANGR 173-01.)

Interrogatories and Answers Thereto

1. Did the United States of America on May 20, 1958, own a T-33A-5 jet airplane bearing serial number NC 53-5966?

2. If the answer to the preceding interrogatory is in the affirmative, please answer the following interrogatories;

(b) When and from whom was this airplane purchased by the United States of America?

(c) For what government branch was said airplane purchased by the United States of America?

(d) Was the said airplane assigned or in some manner transferred or turned over to the Maryland Air National Guard, and if so, when and by whom, and by what document or means? Attach a true and correct copy of the document to your answers to these interrogatories.

90. Who paid for the upkeep, maintenance and repair of the said T-33 jet airplane, Serial Number 53-5966 on and within 5 years prior to May 20, 1958? If paid by the State of Maryland, was the state reimbursed by the federal government, by any subsidy or otherwise?

1. Yes, except the serial number of the T-33A-5 jet airplane was NG 53-5966.

(b) It was purchased by the United States of America from the Lockheed Aircraft Corporation in September, 1955.

(c) It was not purchased for any "government branch" of the United States as it was allocated to the Maryland Air National Guard and delivered by the manufacturer directly to the State of Maryland Air National Guard.

(d) Yes; Headquarters, Air Materiel Command directed Lockheed Aircraft Corporation to release said aircraft to the 104th Fighter Bomber Squadron, Air National Guard, Harbor Field, Baltimore, Maryland. This was accomplished on or about September 26, 1955, by TWX, a copy of which is attached hereto and marked "Exhibit 1".

90. From on or about September 26, 1955, the date of delivery of the aircraft by the manufacturer, the United States Government paid for the upkeep, maintenance and repair of the T-33, Serial No. NG 53-5936, until May 20, 1958.

(Filed Sept. 7, 1961)

Memorandum

The Court will find for the plaintiffs on the preliminary issue: "Was Captain McCoy an employee of the United States acting in the scope of his employment, within the purview of the Federal Tort Claims Act, at the time of the occurrence?"

Counsel for plaintiffs will please submit proposed findings of fact and conclusions of law and order.

BURNITA SHELTON MATTHEWS.

Judge

September 7, 1961

Findings of Fact

1. These cases were tried on the preliminary issue:

"Was Captain McCoy an employee of the United States acting in the scope of his employment, within the purview of the Federal Tort Claims Act, at the time of the occurrence?"

2. The actions arise out of a mid-air collision between a Capital Airlines Viscount Airliner and a T-33 Jet plane owned by the United States and allocated to the Maryland Air National Guard. The collision occurred on May 20, 1958 approximately four miles east-northeast of Brunswick over the State of Maryland, at an altitude of about 8,000 feet on a civil airway known as Victor 44 while the Viscount was enroute from Pittsburgh to Baltimore—Friendship Airport. The T-33 jet plane was being operated by Captain Julius R. McCoy on a local area flight out of Martin Airport, Baltimore, Maryland and was operating under visual flight rules.

3. These three cases are brought under the Federal Tort Claims Act against the United States of America and have been consolidated for trial in this court.

4. The airplane operated by Captain McCoy at the time of the accident belonged to the United States and had been allocated to the Maryland Air National Guard. The United States paid the cost of the fuel used by the airplane on all of its flights, provided equipment, paid the salaries of all civilian and military personnel to maintain said equipment, provided new and spare parts for the equipment and made all major repairs needed by said plane and the other planes allocated to the Guard Unit.

5. On the date of the accident Captain Julius R. McCoy was employed as a full time civilian air technician under the provisions of 32 U. S. C., Section 709(a) which provides for civilian caretakers of United States military property.¹ He was also a commissioned officer in the Air National Guard of the State of Maryland.

6. Pursuant to 32 U. S. C., Section 709(a) the Secretary of the Air Force through the National Guard Bureau promulgated Air National Guard Regulation 40-01 dated 20 December 1954, (hereinafter referred to as ANGR 40-01) which designated the jobs in the air technician categories and prescribed the duties and requirements of the job and the prerequisite training for such employment.

7. Under the authority of ANGR 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01 dated 1 March 1958, (hereinafter referred to as ANG M 40-01) which provides that its provisions will govern all Air National Guard civilian employees. Said manual further provides that the "authority of the National

¹ 32 U. S. C., Section 709(a), Aug. 10, 1956, c. 1041; 70A Stat. 614 provides:

"... Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

Guard Bureau to regulate employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for all caretakers and clerks in the National Guard Bureau.' "

8. Air technicians such as Captain McCoy are full time civilian personnel who are placed at National Guard installations to maintain federal property and records, to the prescribed standard of the Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air technician (caretaker) under provisions of ANGR 40-01, Captain McCoy attended a nine months' course for Maintenance Officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. He was ordered to active duty and required to attend the school at Chanute by authority of the Secretary of the Air Force. While attending this school, he was paid by the United States Air Force Finance Office at Chanute.

9. As an air technician (caretaker), Captain McCoy held a job entitled Aircraft Maintenance Chief. This job required him to see that 28 aircraft belonging to the United States were properly maintained in accordance with Air Force regulations and to supervise approximately 60 to 65 persons at the Base working on the maintenance and care of these airplanes owned by the United States. All these aircraft were allocated to the Maryland Air National Guard by the National Guard Bureau and were located at Martin Airport near Baltimore, Maryland.

10. Aircraft maintenance procedures are set by the United States Air Force and the responsibilities of Aircraft Maintenance Chiefs are outlined by United States Air Force regulations, manuals, and technical orders. To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force Adviser who was on active duty with the

United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, he would so report to the Air Force.

11. United States Air Force Inspection Teams made inspections to determine whether the Air Technicians were complying with the requirements of ANGR 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs. If the United States found that a civilian employee of an Air National Guard Unit was not meeting the requirements, it could, in practical effect, work his discharge by stopping his salary.

12. At the time of the occurrence, in addition to his duties as Aircraft Maintenance Chief, Captain McCoy was Acting Maintenance Supervisor for the Base in the absence of Major Mitchell who held this assignment but who was away on a training program. (Prior to May 16, 1958, Captain McCoy had been Maintenance Supervisor but his job status was changed effective that date to Aircraft Maintenance Chief.) At the time of the occurrence, Captain McCoy was the only officer in the aircraft maintenance field at the Base.

13. As Acting Maintenance Supervisor, Captain McCoy had approximately 75 to 80 civilian maintenance personnel under his supervision. The duties of this job included supervision of the maintenance and care of aircraft, vehicles, ground support equipment, all United States property at the Base, and also over-all supervision of the people who maintained the equipment.

14. As an air technician, i.e. in his civilian capacity, Captain McCoy was employed at the Base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he would be in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer. The accident occurred on a Tuesday, when

Captain McCoy normally worked in his civilian capacity as an air technician.

15. Captain McCoy's immediate superior in his civilian employee status was Lt. Col. Kilkowski, who was also, in addition to his military status as a member of the Maryland Air National Guard in which he was commanding officer of the Squadron, a civilian employee holding the air technician position of Base Detachment Commander.

16. Captain McCoy applied to Lt. Col. Kilkowski for permission, and received it, to make the flight on May 20, 1958, accompanied by a passenger, Donald Chalmers, who was a member of the Maryland Army National Guard. Captain McCoy informed Lt. Col. Kilkowski that the purpose of the flight was a proficiency flight, and the flight clearance and order issued in connection with the flight indicate that the purpose of the flight was proficiency.

17. In order to maintain his aeronautical rating as a pilot, it was necessary that Captain McCoy perform proficiency flights to comply with the requirements of AFR 60-2² which prescribes certain minimum flying requirements for maintenance of a rating as a flying officer.

18. An aeronautical rating only allows a man to fly the aircraft, if he obtains permission to do so. It does not determine his purpose or the work he is properly doing in flying that aircraft.

19. While the job description of the Aircraft Maintenance Chief's position set forth in Civilian Personnel Manual ANGMC 40-01 contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for Base Maintenance Supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft."

² The reference to AFR 60-2 pertains to Air Force Regulation No. 60-2 dated 14 March 1955.

20. It is desirable for the Maintenance Officer to have a flying status for various reasons. For example, when he flies he gets a better understanding of the quality of the maintenance and the condition of the equipment.

21. Captain McCoy's status as Acting Maintenance Supervisor and Aircraft Maintenance Chief for the Base made it desirable for him to make frequent aerial flights. This was an important facet of his work in maintenance. As an air technician Aircraft Maintenance Officer, one reason for this flight or any flight that he engaged in was to insure the proper maintenance of the equipment over which he had general supervision. While flying, he could see and check the cleanliness of his runways, parking and service areas (ramps), see the condition of the airport, check the efficiency of the tower personnel and the way his maintenance people reacted. In short, whenever he flew he could get a better appreciation of the way the people under his supervision were doing their job. It was also part of Captain McCoy's duties in his air technician civilian job to fly functional check flights. Therefore, since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to Captain McCoy's civilian job.

22. During the course of the flight Captain McCoy checked the efficiency of the equipment in order to determine if it were working properly.

23. The particular flight at the time of the accident was part of Captain McCoy's function to maintain proficiency and maintain the equipment.

24. Captain McCoy in his full time air technician (caretaker) job was paid by check drawn on the Treasury of the United States. His annual salary was \$7,500 per annum. He was also paid approximately \$2,000 per annum by the Treasurer of the United States for his part-time military duties.

25. While it was necessary for Captain McCoy to have a military pilot's rating in order to fly a United States military plane, his work in flying such plane could involve performance in a dual (military and civilian) capacity. However, he could only occupy one *pay* status at a time. He could occupy his pay status as a civilian caretaker in maintenance work or he could occupy his pay status as an air National Guardsman in a military capacity.

26. In addition to the civil or military pay statuses, he could receive or earn extra flight pay for flying in any month. In May 1958, at the time of the accident, Captain McCoy had accumulated more than the number of hours for which he could earn flight pay for the period in question. His flight on the occasion in question therefore was not to earn flight pay.

27. On the morning in question, Tuesday, May 20, 1958, Captain McCoy reported to the Base and commenced work, at the usual starting time, on his full time civilian caretaker job as an air technician in the position of Aircraft Maintenance Chief. That day he was also the Acting Maintenance Supervisor in Major Mitchell's absence. Before the flight he performed certain administrative duties required every day to establish the order of business for the day; that included the determination of which aircraft would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals. At the time of the occurrence, he was recorded as present at the Base in his civilian capacity. He was carried on the roster in his air technician pay status and was ultimately paid by the United States Treasurer in this capacity.

28. Following the accident, because of his injuries, Captain McCoy was unable to continue with his work and his status was changed on the roll at the Base on that same day from "active duty" as civilian air technician to an "inactive" or "sick" status as civilian air technician.

29. The passenger who rode with Captain McCoy, Donald A. Chalmers, was required to sign a release prior to the flight releasing the United States and the State of Maryland from any liability on account of Chalmers' injury or death due to the flight.

30. Following the accident, application was made by Captain McCoy for benefits (medical care and treatment of the injuries suffered) under the Federal Employees' Compensation Act.³

31. Captain McCoy was entitled to medical care and treatment under the Federal Employees' Compensation Act only if he were injured in his capacity as a federal employee (air technician working in civilian status as maintenance officer of United States Government property) while in the performance of his duty. He was not entitled to any benefits under that Act if he were injured while working in his military capacity in the Air National Guard, since different benefits were provided by another statute (32 U. S. C. 319) for injuries occurring to a guardsman while acting in a military capacity.

32. Lt. Col. Kilkowski, the Base Detachment Commander, approved the application of Captain McCoy for medical and hospital benefits under the Federal Employees' Compensation Act.

33. Thereafter, Colonel Ebaugh, United States Property and Fiscal Officer for the State of Maryland, on active duty in the service of the United States, employed by the National Guard Bureau, a federal agency, working directly under General Wilson, Deputy Chief of the Bureau, approved the claim, stating that Captain McCoy was injured in the course of his employment as a "civil employee of the United States and not as a member of the Maryland National Guard" (Plaintiffs' Ex. 5G).

³ 5 U. S. C. 751 et seq.

34. The United States Department of Labor, through Stuart Rothman, its solicitor, by Mr. Wright, Chief of its Subrogation Branch, and by a claims supervisor for the Bureau of Employees' Compensation, United States Department of Labor, John Stasko, and by John M. Diggins, a claims examiner of the same department, in the usual course of business:

(a) Approved the claim and authorized the payment of benefits under the Federal Employees' Compensation Act for Captain McCoy as a federal civilian employee injured in the performance of his duties;

(b) Paid such benefits;

(c) Prepared and had Captain McCoy execute a written assignment to the United States of subrogation rights to recover from Captain Airlines and against any other parties than the United States the amount of benefits paid for Captain McCoy by the United States under the Federal Employees' Compensation Act. This assignment stated that Captain McCoy was injured "while employed as Aircraft Maintenance Chief (pilot) by the Department of the Air Force". (Pls. Ex. 5E).

35. In flying the airplane at the time of the occurrence, Captain McCoy was at least in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base, and therefore, was an employee of the United States acting within the scope of his employment..

BURNITA SHELTON MATTHEWS,

Judge.

October 27, 1961

Conclusions of Law

1. A person employed as an air technician (caretaker) in a non-activated National Guard Unit is an employee of the United States within the meaning of the Federal Tort Claims Act.

2. Captain Julius R. McCoy was at the time of the accident an employee of the United States acting in the scope of his employment,¹ within the purview of the Federal Tort Claims Act.

3. Judgment on the preliminary issue will be entered in favor of the plaintiffs.

BURNITA SHELTON MATTHEWS,
Judge.

October 27, 1961

Order

These causes coming on for hearing at this term of court, and upon consideration of the depositions, exhibits and testimony, it is by the court this 27th day of October, 1961,

ORDERED, that judgment be and is hereby entered in favor of the plaintiffs on the issue: "Was Captain McCoy an employee of the United States acting in the scope of his employment, within the purview of the Federal Tort Claims Act, at the time of the occurrence?"

BURNITA SHELTON MATTHEWS,
Judge.

¹ *Restatement of the Law of Agency*, Agency 2nd, Sections 226, 228, 229, 235 and 236; *Great Atlantic and Pacific Tea Co. v. Nappenger*, 171 Md. 378, 390; 189 A. 434, 440.

PLAINTIFF'S EXHIBIT No. 5

RELEASE

Martin Airport
(Place)

20 May '58
(Date)

KNOW ALL MEN BY THESE PRESENTS: WHEREAS, I,
DONALD A. CHALMERS
(Full Name)

am this date to take a flight or flights as a passenger in certain Air National Guard aircraft of the Maryland Air National Guard; and whereas, I am doing so entirely upon my own initiative, risk, and responsibility; now, therefore, in consideration of the permission extended to me by the United States and the State of Maryland through its officers and agents to take paid flight or flights, I do hereby for myself, my heirs, executors, and administrators, remise, release, and forever discharge the Government of the United States and the State of Maryland, and all its officers and agents, acting officially or otherwise, from any and all claims, demands, notions, or causes of action, on account of my death or on account of any injury to me which may occur by reason of the said flight or flights.

The term "flight or flights" as used herein is understood and agreed to include the preparation for, continuation, and flight operations incident thereto. It is further understood and agreed that this release, among other things, extends to and includes negligence, faulty pilotage, and structural failure of the aircraft thereof.

[fol. 690] The execution hereof does not operate to waive any statutory right conferred by act of Congress.

Signature Illegible
(Witness)

DONALD A. CHALMERS
(Signature).

Signature Illegible
(Witness)

MRS. A. E. CHALMERS
(Name of person to be notified in case of emergency)

Signature Illegible
(Witness)

Va. 5-2622

8427 Pleasant Plains Rd.
Balto., 4

(Address of person to be notified in case of emergency)

EXCERPT FROM INTERROGATORIES

Q. 128. What was the training area of the Air National Guard of the State of Maryland on and prior to May 20, 1958?

A. 128. Upon information and belief, the training area of the Maryland Air National Guard, on and prior to May 20, 1958, was in the Continental United States.

[fol. 691]

IN UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 17503

STATE OF MARYLAND for the use of NADINE Y. LEVIN, individually, and as next friend, mother and guardian of and for the use of JOY ELLEN LEVIN, an infant under the age of 14 years; and MELLON NATIONAL BANK AND TRUST COMPANY as Executor of the Estate of Jack Levin, deceased,

VS.

UNITED STATES OF AMERICA.

OPINION—Entered December 20, 1961

WALLACE S. GOURLEY, Chief Judge:

In this non-jury proceeding under the Federal Tort Claims Act based upon two death actions arising from a mid-air collision between a Capital commercial airliner and a T-33 jet plane owned by the United States of America, the court is confronted with three issues requiring determination:

1. Was Captain Julius R. McCoy, pilot of the T-33 jet plane, an employee of the United States acting in the scope of his employment within the purview of the Federal Tort Claims Act at the time of the accident?

2. Was Captain Julius R. McCoy guilty of negligence which was a substantial factor in bringing about the accident?

[fol. 692] 3. What damages were sustained?

Upon evaluation of all the testimony, oral and documentary, and the inferences deducible therefrom the court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

PART I—AGENCY OF CAPTAIN MCCOY IN OPERATION OF THE
JET T-33 AIRCRAFT

1. The actions arise out of a mid-air collision between a Capital Airlines Viscount Commercial Air Transport aircraft and a T-33 Jet aircraft owned by the United States and allocated to the Maryland Air National Guard. The collision occurred on May 20, 1958, approximately four miles east-northeast of Brunswick over the State of Maryland, at an altitude of about 8,000 feet on a civil airway known as Victor 44 while the Viscount was enroute from Pittsburgh to Baltimore—Friendship Airport. The T-33 jet aircraft was being operated by Captain Julius R. McCoy on a local area flight originating out of Martin Airport, Baltimore, Maryland, and was operating under visual flight rules.

2. These two cases are brought under the Federal Tort Claims Act against the United States of America and have been consolidated for trial in this court.

3. The airplane operated by Captain McCoy at the time of the accident belonged to the United States and had been allocated to the Maryland Air National Guard. The United States paid the cost of the fuel used by the airplane on all of its flights, provided equipment, paid the salaries of all civilian and military personnel to maintain said equipment, provided new and spare parts for the equipment and made all major repairs needed by said plane and the other planes allocated to the Guard Unit.

4. On the date of the accident Captain Julius R. McCoy was employed as a full time civilian air technician under [fol. 693] the provisions of 32 U.S.C.A. § 709(a) which provides for civilian caretakers of United States Military Property.¹ He was also a commissioned officer in the Air National Guard of the State of Maryland.

¹ 32 U.S.C.A. Section 709(a) provides:

“ . . . Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National

5. Pursuant to 32 U.S.C.A. § 709(a) and under the direction of the Secretary of the Air Force there was promulgated a "Civilian Personnel Manual," dated December 20, 1954, (hereinafter referred to as ANGM 40-01) which listed the jobs in the air technician categories and prescribed the duties and requirements of the jobs and the prerequisite training for such employment. This also contained a job description of aircraft maintenance chief and aircraft maintenance supervisor.

6. Under the authority of ANGM 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01 dated 1 March 1958, (hereinafter referred to as ANGM 40-01) which provides that its provisions will govern all Air National Guard civilian employees. Said manual further provides that the "authority of the National Guard Bureau to regulate employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for all Caretakers and Clerks in the National Guard Bureau.'"

7. Air technicians such as Captain McCoy are full time civilian personnel who are placed at National Guard installations to maintain federal property and records, to the prescribed standard of the United States Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air [fol. 694] technician (caretaker) under provisions of ANGM 40-01, Captain McCoy attended a nine months' course for Maintenance Officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. He was ordered to active duty and required to attend the school at Chanute by authority of the Secretary of the Air Force. While attending this school, he was

Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

paid by the United States Air Force Finance Office at Chanute.

8. As an air technician (caretaker), Captain McCoy held a job entitled Aircraft Maintenance Chief. This job required him to see that 28 aircraft belonging to the United States were properly maintained in accordance with Air Force regulations and to supervise approximately 60 to 65 persons at the Base working on the maintenance and care of these airplanes owned by the United States.

9. Aircraft maintenance procedures are set by the United States Air Force and the responsibilities of Aircraft Maintenance Chiefs are outlined by United States Air Force regulations, manuals, and technical orders. To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force Adviser who was on active duty with the United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, he would so report to the Air Force.

10. United States Air Force Inspection Teams made inspections to determine whether the Air Technicians were complying with the requirements of ANG M 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs. If the United States found that a civilian employee of an Air National Guard Unit was not meeting the requirements, it could, in practical effect, work his discharge by stopping his salary.

11. At the time of the occurrence, in addition to his duties as Aircraft Maintenance Chief, Captain McCoy was Acting Maintenance Supervisor for the Base in the absence of Major Mitchell who held this assignment but who was away on a training program. (Prior to May 16, 1958, Captain McCoy had been Maintenance Supervisor but his job status was changed effective that date to Aircraft Maintenance Chief.) At the time of the occurrence, Captain McCoy was the only officer in the aircraft maintenance field at the Base.

12. As Acting Maintenance Supervisor, Captain McCoy had approximately 60 to 65 civilian maintenance personnel under his supervision. The duties of this job included supervision of the maintenance and care of aircraft, vehicles, ground support equipment, all United States property at the Base, and also over-all supervision of the people who maintained the equipment.

13. As an air technician, i.e., in his civilian capacity, Captain McCoy was employed at the Base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he would be in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer. The accident occurred on a Tuesday, when Captain McCoy worked in his civilian capacity as an air technician in accordance with the usual practice and procedure at the Base.

14. Captain McCoy's immediate superior in his civilian employee status was Lt. Col. Kilkowski, who was also, in addition to his military status as a member of the Maryland Air National Guard in which he was commanding officer of the Squadron, a civilian employee holding the air technician position of Base Detachment Commander.

15. Captain McCoy applied to Lt. Col. Kilkowski for permission, and received it, to make the flight on May 20, 1958, accompanied by a passenger, Donald Chalmers, who was a member of the Maryland Army National Guard. Captain McCoy informed Lt. Col. Kilkowski that the purpose of the flight was a proficiency flight, and the flight [fol. 696] clearance and order issued in connection with the flight indicate that the purpose of the flight was proficiency.

16. In order to maintain his aeronautical rating as a pilot, it was necessary that Captain McCoy perform proficiency flights to comply with the requirements of AFR 60-2² which prescribes certain minimum flying requirements for maintenance of a rating as a flying officer.

² The reference to AFR 60-2 pertains to Air Force Regulation No. 60-2 dated 14 March 1955.

17. An aeronautical rating only allows a man to fly the aircraft, if he obtains permission to do so. It does not determine his purpose or the work he is properly doing in flying that aircraft.

18. While the job description of the Aircraft Maintenance Chief's position set forth in Civilian Personnel Manual ANGM 40-01 contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for Base Maintenance Supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft."

19. It is desirable for the Maintenance Officer to have a flying status for various reasons. For example, when he flies the aircraft, he observes under operating conditions the quality of the maintenance being performed thereon as well as the condition of the equipment, all of which is necessary to and part of the efficient performance of his job as air technician and caretaker of United States property.

20. Captain McCoy's status as Acting Maintenance Supervisor and Aircraft Maintenance Chief for the Base made it desirable for him to make frequent aerial flights. This was an important part of his work in maintenance of the aircraft. As an air technician Aircraft Maintenance Officer, one reason for this flight or any flight that he engaged in was to insure the proper maintenance of the [fol. 697] equipment over which he had general supervision. While flying, he could also see and check the cleanliness of his runways, parking and service areas (ramps), see the condition of the airport, check the efficiency of the tower personnel and the way his maintenance people reacted. In short, whenever he flew he could get a better appreciation of the way the maintenance (caretaker) people under his supervision were doing their job. It was also part of Captain McCoy's duties in his air technician civilian job to fly functional check flights. Therefore, since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to Captain McCoy's civilian job.

21. During the course of the flight Captain McCoy checked the efficiency of the T-33 jet and its equipment in order to determine if it were working properly and if the maintenance thereon had been properly performed.

22. The particular flight at the time of the accident was part of Captain McCoy's function to maintain proficiency and maintain the equipment of the United States as a civilian air technician (caretaker).

23. Captain McCoy in his full time air technician (caretaker) job was paid by check drawn on the Treasury of the United States. His annual salary was \$7,500 per annum. He was also paid approximately \$2,000 per annum by the Treasurer of the United States for his part-time military duties.

24. While it was necessary for Captain McCoy to have a military pilot's rating in order to fly a United States military plane, his work in flying such plane could involve performance in a dual (military and civilian) capacity. However, he could only occupy one pay status at a time. He could occupy his pay status as a civilian caretaker in maintenance work or he could occupy his pay status as an air National Guardsman in a military capacity.

[fol. 698] 25. In addition to the civil or military pay status he could receive or earn extra flight pay for flying in any month. In May 1958, at the time of the accident, Captain McCoy had accumulated more than the number of hours for which he could earn flight pay for the period in question. His flight on the occasion in question therefore was not to earn flight pay.

26. On the morning in question, Tuesday, May 20, 1958, Captain McCoy reported to the Base and commenced work, at the usual starting time, on his full time civilian caretaker job as an air technician in the position of Aircraft Maintenance Chief. That day he was also the Acting Maintenance Supervisor in Major Mitchell's absence. Before the flight he performed certain administrative duties required every day to establish the order of business for the day; that included the determination of which aircraft

would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals. At the time of the occurrence, he was recorded as present at the Base in his civilian capacity. He was carried on the roster in his air technician caretaker pay status and was ultimately paid by the United States Treasurer in this capacity.

27. Following the accident, because of his injuries, Captain McCoy was unable to continue with his work and his status was changed on the roll at the Base on that same day from "active duty" as civilian air technician to an "inactive" or "sick" status as civilian air technician.

28. The passenger who rode with Captain McCoy, Donald A. Chalmers, was required to sign a release prior to the flight releasing the United States and the State of Maryland from any liability on account of Chalmers' injury or death due to the flight.

29. Following the accident, application was made by Captain McCoy for benefits (medical care and treatment of [fol. 699] the injuries suffered) under the Federal Employees' Compensation Act.³

30. Captain McCoy was entitled to medical care and treatment under the Federal Employees' Compensation Act only if he were injured in his capacity as a federal employee (air technician working in civilian status as maintenance officer of United States Government property) while in the performance of his duty. He was not entitled to any benefits under that Act if he were injured while working in his military capacity in the Air National Guard, since different benefits were provided by another statute (32 U.S.C.A. 319) for injuries occurring to a guardsman while acting in a military capacity.

31. Lt. Col. Kilowski, the Base Detachment Commander, (Air Technician) approved the application of Captain McCoy for medical and hospital benefits under the aforesaid Federal Employees' Compensation Act.

³ 5 U.S.C.A. § 751, et seq.

32. Thereafter, Colonel Ebaugh, United States Property and Fiscal Officer for the State of Maryland, on active duty in the service of the United States, employed by the National Guard Bureau, a federal agency, working directly under General Wilson, Deputy Chief of the Bureau, approved the claim, stating that Captain McCoy was injured in the course of his employment as a "civil employee of the United States and not as a member of the Maryland National Guard."

33. The United States Department of Labor, through Stuart Rothman, its solicitor by one Mr. Wright, Chief of its Subrogation Branch, and by a claims supervisor for the Bureau of Employees' Compensation, United States Department of Labor, John Stasko, and by John M. Diggins, a claims examiner of the same department, in the usual course of business:

(a) Approved the claim and authorized the payment of benefits under the Federal Employees' Compensation Act for Captain McCoy as a federal civilian employee injured in the performance of his duties;

(b) Paid such benefits;

(c) Prepared and had Captain McCoy execute a written assignment to the United States of subrogation rights to recover from Capital Airlines and against any other parties than the United States the amount of benefits paid for Captain McCoy by the United States under the Federal Employees' Compensation Act. This assignment stated that Captain McCoy was injured "while employed as Aircraft Maintenance Chief (pilot) by the Department of the Air Force."

34. In operating the airplane at the time of the occurrence, Captain McCoy was carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base, and therefore, was a civil employee of the United States acting within the scope of his employment.

**PART II—NEGLIGENCE OF CAPTAIN MCCOY WHILE ACTING AS
AN AGENT OF THE UNITED STATES OF AMERICA.**

35. The collision occurred in clear and unobstructed skies on May 20, 1958, at about 11:27 A.M., Eastern Daylight Time, while the Viscount was enroute under Instrument Flight Rules from Pittsburgh to Baltimore—Friendship Airport. The T-33 jet plane was being operated by Captain Julius B. McCoy, an employee of the United States, in the course and scope of his employment, on a local area flight out of Martin Airport, Baltimore, Maryland, and was operating under Visual Flight Rules. Both aircraft were operating subject to the Civil Air Regulations of the United States.

36. Prior to the accident the Capital Airlines plane was observed by a number of witnesses who testified that prior to and including the moment of the collision with the T-33 Jet the Capital Airlines' Viscount was proceeding straight [fol. 701] ahead on an easterly course in level flight and did not change its course up or down or to the left or to the right.

37. The same witnesses also testified that the T-33 Jet operated by Captain Julius R. McCoy was also traveling in an easterly direction and at a faster rate of speed than the Capital plane; that it approached and overtook the Capital plane after being observed on an approximately parallel course which was a distance of approximately one mile or more north of the Capital Viscount and that the T-33 Jet then made a turn toward the right as it was approaching the Capital plane, approached it obliquely from the left and initially struck the Capital plane in its forward nose section; that the T-33 jet struck the Viscount under conditions of clear visibility.

38. The T-33 Jet initially struck the Capital plane with its right tip-tank, a fuel tank located and attached to the tip and outer end of the right wing.

39. Following the initial impact the Jet aircraft then rolled over the top of the Capital Viscount and exploded in the air.

40. Following the impact, the Capital Viscount continued ahead for a short distance, and then commenced to slowly spiral down to the ground in a relatively level altitude and intact condition with no apparent inflight damage to its cabin section. The Viscount struck the ground after the passage of an appreciable interval of time from the moment of collision. Upon striking the ground, the Viscount broke up and was destroyed and all on board were killed.

41. The pilot of the T-33 Jet was ejected from his aircraft during the course of the accident, and opened his parachute. He was the only survivor of the accident. The single passenger in the T-33 jet died in the accident.

42. The pilot of the T-33 Jet, Captain Julius R. McCoy in the operation of his airplane, and in colliding with the Capital Viscount, was negligent and careless in the operation [fol. 702] of his plane, and in addition, violated each of the following Civil Air Regulations:

#60.10. *Application.* Aircraft shall be operated at all times in compliance with the following general flight rules, and also in compliance with either the visual flight rules or the instrument flight rules whichever are applicable.

#60.12. *Careless or reckless operation.* No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

(c) Lack of vigilance by the pilot to observe and avoid other air traffic. In this respect, the pilot must clear his position prior to starting any maneuver, either on the ground or in flight.

(d) Passing other aircraft too closely.

#60.15. *Proximity of aircraft.* No person shall operate an aircraft in such proximity to other aircraft as to create a collision hazard.

43. The pilot of the T-33 jet failed to maintain adequate vigilance although he had clear visibility and sufficient range of vision. He also negligently failed to avoid the Viscount and to take appropriate evasive action.

44. The proximate cause of the accident was the negligence and wrongful conduct of the employee of the defendant, the United States of America, Captain Julius R. McCoy.

PART III. DAMAGES SUSTAINED

A. The Action for the Death of JACK LEVIN

45. Jack Levin was employed as Vice President in charge of Sales and Merchandising by Swift Homes, Inc., on and prior to May 20, 1958.

46. On and prior to May 20, 1958, he was the husband of Nadine Y. Levin and father of Joy Ellen Levin, child of the marriage.

47. That Jack Levin was born on January 4, 1918, and died in the accident on May 20, 1958.

[fol. 703] 48. That he left him surviving as a dependent next of kin his aforesaid widow and child.

49. That Nadine Y. Levin, the widow, was born May 1, 1924; that Joy Ellen Levin, the daughter, was born September 28, 1955.

50. That the said widow and child of Jack Levin were wholly dependent on him for maintenance and support and each of them has suffered pecuniary loss by reason of his death; that in addition his child has suffered the loss of guidance, comfort, education, companionship and the widow has suffered the loss of comfort, companionship, care and affection, and loss of consortium.

51. That at the time of the death of Jack Levin, his expectancy of life based upon the United States Abridged Life Tables was 31.6 years; the expectancy of life of his widow according to the said table on said date was 41.4 years, that the stipulated joint expectancy of life of Jack Levin and Nadine Y. Levin, his widow, on May 20, 1958 was 29 years, that the years from her age at the time of death of Jack Levin until Joy Ellen Levin would become twenty-one years of age was $18\frac{1}{3}$ years; that Jack Levin and his wife and child were in excellent health at the time of his death.

52. While employed by Swift Homes, Inc., Jack Levin's annual earnings were as follows: 1954—\$53,737.16; 1955—\$56,409.28; 1956—\$60,587.26; 1957—\$58,235.05; for the first $4\frac{2}{3}$ months of 1958 to the date of death—\$24,070.20, that had he continued in the employ of said Company there were reasonable prospects for substantial increases in his earnings; and Jack Levin having realized increased annual benefits from the profit sharing plan up to the date of his death and had he not been killed in this accident he would have realized additional substantial benefits from this plan as well as other side benefits by the way of health insurance, premium for life insurance from which we may establish an approximate average earnings of \$60,000 a year.

[fol. 704] 53. That at the time of death and for several years prior thereto, approximately $\frac{2}{3}$'s of the earnings of the said Jack Levin was being used for the support, care, maintenance of his wife and child, that approximately $\frac{1}{3}$ of his said earnings was being used for the maintenance and support of Nadine Y. Levin, his wife, and $\frac{1}{3}$ of his said earnings was being used for the support, care, education and maintenance of his minor child, Joy Ellen Levin; that after payment of taxes on the aforementioned earnings, and after payment by decedent for support of his mother the approximate sum of \$4,000 per year, there remained approximately \$36,000 per year which, according to the foregoing percentages, was expended entirely for the support of Jack Levin and his family of which $\frac{2}{3}$'s was used for their support, care and maintenance; that approximately $\frac{1}{3}$ or \$12,000 out of his said earnings was being used for the maintenance and support of Nadine Y. Levin, his wife, and approximately $\frac{1}{3}$ or \$12,000 of his said earnings was being used for the support, care, maintenance and education of Joy Ellen Levin, his minor child; and these contributions would have continued until the minor child would attain the age of twenty-one, at which time a portion of the earnings which had been used for such child would be added to the share of earnings used by the said widow, Nadine Y. Levin; thereafter the contributions for the care, maintenance and support of the wife would have continued on the basis of $\frac{1}{2}$ of the net earnings after taxes

or \$18,000 per year for the balance of the joint life expectancy, or an additional eleven years.

54. That by reason of the death of Jack Levin, Nadine Y. Levin, his widow, suffered and will suffer pecuniary loss and damages, including loss of society, care, comfort and companionship, and the present cash value of said pecuniary loss and damages reduced to present worth is \$245,000.

55. That by reason of the death of Jack Levin, his child, Joy Ellen Levin, suffered and will suffer pecuniary loss and damages to twenty-one years of age including guidance, [fol. 705] care, loss of society, care and comfort, and the present cash value of said pecuniary loss and damages suffered by said child as a result of the death of her father reduced to present worth is \$100,000.

56. That by reason of the premises, the said Jack Levin experienced conscious pain and suffering from the moment of collision impact until the time of his death after the Viscount aircraft struck the ground; that by reason thereof, Mellon National Bank and Trust Company, the Executor of the Estate of Jack Levin, shall recover from the defendant as follows:

(a) For the conscious pain and suffering of Jack Levin the sum of \$5,000.

(b) For stipulated funeral expenses the sum of \$1,000.

B. The Action for the Death of RUTH M. JOHNS

57. That Ruth M. Johns on and prior to May 20, 1958, was the wife of Sydney L. Johns.

58. That Ruth M. Johns and Sydney L. Johns were married September 16, 1933, and resided together continually as husband and wife until the date of death of Ruth M. Johns.

59. That Ruth M. Johns was born on March 24, 1911, and died in the accident on May 20, 1958, and left her surviving her husband, Sydney L. Johns, that there were no children of said marriage.

60. That Sydney L. Johns, the widower, was born January 4, 1908, and was duly licensed to engage in the practice of medicine in the State of Pennsylvania and practiced in said state from on or about September 30, 1931. Ruth M. Johns and Sydney L. Johns resided together in their own private house in the City of Pittsburgh and that a section of said house was utilized by Sydney L. Johns as an office for the practice of his profession.

[fol. 706] 61. That since 1941 and until the date of her death, Ruth M. Johns was employed by Sydney L. Johns and rendered services to him as an office manager and medical assistant in connection with his practice of medicine and that her duties included answering telephones, taking messages, receptionist, making appointments, keeping records, bookkeeping, billing, assisting in the handling, soothing and calming of patients, care and maintenance of the office and equipment, being present while women patients were being treated and generally useful in the duties of an office manager medical assistant.

62. That Dr. Sydney L. Johns maintained office hours at least five days a week and that Ruth M. Johns rendered services as an office manager and medical assistant at least forty hours a week in addition to her services as a housewife and marriage partner of Sydney L. Johns.

63. That the fair and reasonable value of the services rendered by Ruth M. Johns to Sydney L. Johns as of the time of her death was \$320.00 per month.

64. That in addition to the aforesaid services there existed a relationship of mutual love, affection and devotion between Ruth and Sydney Johns, that they were also dependent upon each other for guidance and companionship and that Ruth Johns also faithfully performed the duties of a housewife in maintaining and keeping the home of Sydney Johns.

65. That Sydney L. Johns by reason of the death of Ruth M. Johns also suffered loss of consortium, care, affection, love and companionship.

66. That by reason of the death of Ruth M. Johns, Sydney L. Johns suffered the loss of her services as his office manager and medical assistant; that his gross income for several years prior to her death was approximately \$9,000 annually and dropped in the year following her death to \$3,312.

[fol. 707] 67. That at the time of death of Ruth M. Johns, her expectancy of life according to the United States Life Tables was 29.36 years; the life expectancy of her widower, Sydney L. Johns, according to the said tables on said date was 22.83 years; that the stipulated joint expectancy of life of Ruth M. Johns and Sydney L. Johns, her widower, on May 20, 1958, was 20 years.

68. That except for a minor impairment of motion of her neck, Ruth M. Johns was in excellent health at the time of her death; that there was no evidence that this impairment of motion limited in any way her life expectancy; that the health of Dr. Sydney L. Johns at the time of the death of Ruth M. Johns was excellent; that the mother of Ruth M. Johns is still alive at the age of eighty-three and her father is still alive at the age of eighty-seven and that her grandmother died at the age of ninety-one; that no evidence in diminution of the aforesaid normal life expectancy of Ruth M. Johns and Sydney L. Johns was offered by the defendant or received by the court.

69. That by reason of the death of Ruth M. Johns, Sydney L. Johns, her widower, suffered and will suffer pecuniary loss and damages including loss of her society, comfort, care, love and guidance and the present cash value of said pecuniary loss and damages reduced to present worth is \$70,000.

70. That by reason of the premises, the said Ruth M. Johns experienced conscious pain and suffering from the moment of collision impact until the time of her death after the Viscount aircraft struck the ground; that by reason thereof, Kennedy Smith, Executor of the Estate of Ruth M. Johns, shall recover from the defendant as follows:

(a) For the conscious pain and suffering of Ruth M. Johns the sum of \$5,000.

(b) For stipulated funeral expenses the sum of \$1,000.

[fol. 708]

Conclusions of Law

1. A person employed as an air technician (caretaker) in a non-activated National Guard unit is an employee of the United States within the meaning of the Federal Tort Claims Act.

2. Captain Julius R. McCoy at the time of the accident was an employee of the United States acting within the scope of his employment within the purview of the Federal Tort Claims Act.

3. The deaths and injuries suffered by the decedents and the plaintiffs herein and the damages resulting therefrom were caused by the negligence of the United States by its employee, Captain Julius R. McCoy, acting within the scope of his employment.

An appropriate Order is entered.

Order

AND NOW, this 20th day of December, 1961, It Is ORDERED AND DECREED AS FOLLOWS:

Judgment will be and hereby is entered in favor of Nadine Y. Levin and against the United States of America in the amount of Two Hundred Forty-five Thousand Dollars (\$245,000).

Judgment will be and hereby is entered in favor of Joy Ellen Levin and against the United States of America in the amount of One Hundred Thousand Dollars (\$100,000).

Judgment will be and hereby is entered in favor of Mellon National Bank and Trust Company, Executor of the Estate of Jack Levin, deceased, and against the United States of America in the amount of Five Thousand Dollars (\$5,000) for conscious pain and suffering, and in the amount of One Thousand Dollars (\$1,000) as stipulated funeral expenses, or a total of Six Thousand Dollars (\$6,000).

Judgment will be and hereby is entered in favor of Sydney L. Johns and against the United States of America in the amount of Seventy Thousand Dollars (\$70,000).

Wallace S. Gourley, CDJ, Chief Judge.

[fol. 709]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14,041 and 14,042

STATE OF MARYLAND for the use of
NADINE Y. LEVIN, et al., *Plaintiff-Appellees*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellant*,

STATE OF MARYLAND for the use of
SYDNEY L. JOHNS, et al., *Plaintiff-Appellees*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellant*.

Appeal from Judgments of the United States District Court
for the Western District of Pennsylvania

Argued May 21, 1963

Before: STALEY, HASTIE and SMITH, *Circuit Judges*.

OPINION OF THE COURT—Filed April 1, 1964

By SMITH, *Circuit Judge*.

These appeals are from judgments in favor of the use plaintiffs in actions for wrongful death brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 and [fol. 710] 2674. The deaths resulted from a mid-air collision between a commercial airliner owned by Capital Airlines, in which the decedents were passengers, and a jet

trainer plane owned by the defendant and allocated to the Maryland Air National Guard pursuant to § 702(a), 32 U.S.C., and the regulations promulgated thereunder; the collision occurred within the territorial limits of Maryland. The federally owned plane was piloted by one Captain Julius R. McCoy, a rated pilot and a commissioned officer of the Air Guard, employed full time in civilian status as a maintenance technician holding the classified position of Aircraft Maintenance Chief. At the time of the accident the Maryland Air National Guard was not in the active service of the United States.

The trial court found that the sole proximate cause of the accident was "the negligence and wrongful conduct" of the pilot of the federally owned plane. This finding is not challenged here. The trial court also found that at the time of the accident the pilot was acting in his capacity as an "air technician," and, as such, "was a civil employee of the United States acting within the scope of his employment." This finding, on which the respondeat superior liability of the defendant was predicated, is challenged as clearly erroneous and legally unsupportable. We find it necessary to dispose of two preliminary questions before entering upon a consideration of the principal issues raised by these appeals.

PRELIMINARY QUESTIONS

The plaintiffs argue that under rule 52(a) Fed. Rules Civ. Proc., 28 U.S.C.A., the trial court's findings of fact may "not be set aside unless clearly erroneous." We do not agree that the "clearly erroneous" test is applicable on the present appeal. The actions were submitted to the trial court on the record made in the consolidated trial of related cases tried in the United States District Court for the District of Columbia. This record consisted primarily, [fol. 711] although not entirely, of depositions and written exhibits as to which there was no dispute.

It has been held by this Court, and others, that under such circumstances the findings of fact are reviewable on appeal and need not be given the weight usually accorded them under the rule. *Surgical Supply Service, Inc. v.*

Adler, 321 F. 2d 536, 539 (3rd Cir. 1963); *Mayo v. Pioneer Bank & Trust Company*, 297 F. 2d 392, 395 (5th Cir. 1961); *Merchants National Bank and Trust Co. v. United States*, 246 F. 2d 410, 417 (7th Cir. 1957), cert. den. 355 U. S. 881 (1957), reh. den. 355 U. S. 920 (1958); *Lang v. First Nat. Bank of Houston*, 215 F. 2d 118, 120 (5th Cir. 1954); *In Re Kellet Aircraft Corp.*, 186 F. 2d 197, 200 (3rd Cir. 1950); *Orvis v. Higgins*, 180 F. 2d 537, 539, 540 (2d Cir. 1950), cert. den. 340 U. S. 810 (1950). We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal.

We note further that the consolidated trial of the related actions resulted in judgments favorable to the plaintiffs therein concerned. These judgments, one of which was reversed only on the issue of damages, were affirmed on appeal to the United States Court of Appeals for the District of Columbia. *United States v. State of Maryland*, 322 F. 2d 1009 (1963). A petition for a writ of certiorari was denied on December 16, 1963, 32 U. S. L. Week 3220. This denial "imports no expression of opinion upon the merits" of the cases involved, *United States v. Carver*, 260 U. S. 482, 490 (1923); *House v. Mayo*, 324 U. S. 42, 48 (1945); *Sunal v. Large*, 332 U. S. 174, 181 (1947), and is therefore of no significance in the instant appeals.

FIRST QUESTION.

The Federal Tort Claims Act imposes liability upon the United States for personal injury or death caused by [fol. 712] the negligence or wrongful act or omission of "any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. 1346(b). The term "employee of the government," as defined by statute, "includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal

agency in an official capacity, temporarily or permanently in the service of the United States, . . . " 28 U.S.C. 2671.

The first and most important question for decision is whether the relationship between the United States and Captain McCoy, in his civilian position as an air technician, was that of employer and employee within the meaning of the statute. The determination of the question requires consideration of the historical origin of the National Guard and the constitutional and statutory provisions under which it is organized, maintained, disciplined and regulated in its peacetime status.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The respective powers of the federal and state governments with relation to the militia forces are defined by Article 1, § 8 of the Constitution, which provides, in pertinent parts, as follows:

"The Congress shall have Power . . . , to . . . provide for the common Defence and general Welfare of the United States;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the [fol. 713] United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

. . . ; and

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

These provisions established a division of mutually exclusive powers. There was vested in Congress the limited power to enact laws necessary to the effective organiza-

tion of the militia forces which were deemed necessary to the common defense. There was reserved to the states the right to organize, maintain and regulate such forces and to appoint and commission their officers, a right which existed in and was exercised by the states prior to the adoption of the Constitution. *Selective Draft Law Cases*, 245 U. S. 366, 383 (1918). The quoted clauses made it manifest that the militia units were to remain subject to the control and authority of their respective states until called into the active service of the United States for the special purposes authorized.

The militia forces of the several states are, and, since 1903, have been organized and maintained as units of the National Guard¹ under joint federal-state auspices. *Act of January 21, 1903*, 32 Stat. 775, commonly known as the Dick Act. However, the first comprehensive exercise of the Congressional power was the enactment of the National Defense Act of 1916, 39 Stat. 166, and the amendments contained in the Act of June 4, 1920, 41 Stat. 759.

The cited legislation provided for the reorganization of the Army of the United States, and, as an incident [fol. 714] thereto, the organization and training of the National Guard units of the various states on a basis conforming to that of the Regular Army. However, it should be emphasized that both acts specifically declared that the organized Guard was to be a component of the Army of the United States only "while in the service of the United States." There was in each of the acts a specific recognition by Congress of the constitutional limitations on its power. This legislation did not alter the status of the National Guard units as independent military forces subject to the exclusive jurisdiction of the several states, except when mustered into the active service of the United States.

The enactments of 1916 and 1920 authorized the appropriation of funds for the support of the National Guard and the apportionment thereof among the states

¹ The organized militia units of the several States and Territories were officially designated as the National Guard, a designation used by many of the states prior to the Dick Act.

and territories whose organized units met the standards prescribed by the enactments and the regulations promulgated thereunder by the Secretary of War, a condition precedent to federal recognition. While Congress assumed full responsibility for the financial support of the National Guard units which qualified for federal recognition, it specifically recognized the constitutional authority of the several states and territories to organize, maintain and discipline their respective units under local law.

The statutes also authorized the procurement, at federal expense, of arms, equipment and material, and the issue thereof to the National Guards of the several states and territories upon requisition of their respective governors. As a condition precedent to the allocation of such property, the states were required to make adequate provision for its maintenance and protection. The relevant sections of the Act, and the amendments thereto, provided that the arms, equipment and material issued were to remain the property of the United States and, further, that the states would be held liable for the loss, damage or the destruction of property due to carelessness or neglect. [fol. 715] It is clear that under the statutory plan the possession and control of the allocated property, as well as the responsibility for its care and maintenance in accordance with prescribed standards, were to be committed to the states.

The Acts of 1916 and 1920 were further amended by the Act of June 15, 1933, 48 Stat. 153. The only amendment here relevant (Section 5) established the "National Guard of the United States" as a "reserve component of the Army of the United States," consisting of the "federally recognized National Guard units" of the states. However, the statute did not alter the status of the Guard units or their relationship to the federal government. The amendment specifically provided that "*the members of the National Guard of the United States shall not be in the Active Service of the United States except when ordered thereto in accordance with law, and, in time of peace, They Shall be Administered, Armed, Uniformed, Equipped, and Trained in Their Status as the National Guard of the Several States . . .*" (Emphasis supplied).

The laws relating to the military forces, including the National Guard, were revised and codified by the Act of August 10, 1956, entitled "An Act to revise, codify, and enact into law, title 10 of the United States Code, entitled 'Armed Forces', and title 32 of the United States Code, entitled 'National Guard'." 70A Stat. 1. This initial codification was restricted to the statutes which had become effective prior to March 31, 1955. The statutes which became effective thereafter were incorporated into the codification by the Act of September 2, 1958, 72 Stat. 1437. The purposes of the codification were to restate and clarify the existing laws and to eliminate earlier provisions which had become obsolete, particularly those contained in the Acts of 1916 and 1920. The substance of the laws was not changed.

The codification defined, as did the earlier legislation, a division of powers consonant with Article 1, § 8 [fol. 716] of the Constitution, *supra*. There was reserved to the states the authority to organize, discipline, train and regulate their National Guard units, as theretofore, but in accordance with standards of training and discipline prescribed by the acts of Congress and the regulations promulgated thereunder by either the Secretary of the Army or Secretary of the Air Force. It is clear from the legislation that compliance with these standards was a condition precedent to the right of the states to federal recognition and subsidization.

DISCUSSION.

At all times therein relevant, the pilot of the federally owned plane, Captain McCoy, held a dual status. He was a commissioned officer of the Maryland Air National Guard under appointment by the Governor. *Maryland Code*, Article 65, § 70. As a duly appointed and commissioned officer, he had qualified for federal recognition, pursuant to §§ 305 and 307 of Title 32 U.S.C., and the pertinent regulations, and by reason thereof his military earnings were paid directly from federal funds. We should add that in his military status Captain McCoy was the

"aircraft squadron maintenance officer," a position comparable to the one he held in his civilian capacity.

In his civilian status Captain McCoy was a full-time maintenance technician employed by the Adjutant General of the Maryland National Guard, the person designated by the Secretary of the Air Force as the one authorized to employ civilian personnel. 32 U.S.C. § 709(f). He held the position of Aircraft Maintenance Chief and, as such, was responsible for the civilian employees in the Aircraft Maintenance Section² and the care, inspection and repair of aircraft and equipment. *Air National Guard Manual* (ANGM 40-41), p. 107. On the day of the accident he was "Acting Maintenance Supervisor" and, as such, was responsible for the operation of the Maintenance Division [fol. 717] under the general supervision of Lt. Col. Kilowski, a commissioned officer of the Guard who in civilian status held the position of Base Detachment Commander. *Air National Guard Manual* (ANGM 40-01), pp. 105 and 106. His civilian salary, like his military salary, was paid directly from federal funds pursuant to statutory authorization.

It was on the basis of the facts summarized in the foregoing paragraph that the court below held that Captain McCoy in his civilian status was an employee of the United States, within the meaning of the Federal Tort Claims Act, *supra*. There is support for this holding in the cases hereinafter considered and upon which the appellees rely.

The appellate courts have uniformly held that the federally recognized members of National Guard units not in active federal service are not employees of the United States within the meaning of the said Act. It has been held that they are employees of their respective states. *Williams v. United States*, 189 F. 2d 607 (10th Cir. 1951); *Dover v. United States*, 192 F. 2d 431 (5th Cir. 1951); *McCranie v. United States*, 199 F. 2d 581 (5th Cir. 1952), cert. den. 345 U. S. 922; *Storer Broadcasting Company v. United States*, 251 F. 2d 268 (5th Cir. 1958), cert. den. 356 U. S. 951; *Patino v. United States*, 311 F. 2d 604

² A section within the Maintenance Division which was under the supervision of the Base Detachment Commander.

(10th Cir. 1962), cert. den. 373 U. S. 911. But see *O'Toole v. United States*, 206 F. 2d 912 (3rd Cir. 1953).³ We should emphasize that in each of the cited cases the Court regarded as of no significance the following facts: the Guard member had qualified for federal recognition, was compensated directly from federal funds, and was in possession and control of a federally owned vehicle involved in the accident which gave rise to claims for personal injury.

These appellate courts have held, also uniformly, that enlisted members of the National Guard, employed in civilian status as maintenance technicians pursuant to [fol. 718] federal regulations, are employees of the United States within the meaning of the said Act. *United States v. Holly*, 192 F. 2d 211 (10th Cir. 1951); *Elmo v. United States*, 197 F. 2d 230 (5th Cir. 1952); *United States v. Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney v. United States*, 230 F. 2d 112 (2nd Cir. 1956).⁴ *United States v. State of Maryland*, supra. We emphasize that in each of these cases the Court regarded as significant, and somewhat determinative, the following facts: the maintenance technician qualified for employment under federal regulations, was paid directly from federal funds, and was responsible for the repair and maintenance of federally owned equipment in accordance with prescribed regulations. The courts held that by reason of the regulations under which the maintenance technician was employed and compensated, performed his duties, and was responsible for the maintenance of federally owned property, he was under the direction and control of the United States and therefore its employee.

It is difficult for us to perceive how factors may be considered immaterial in one situation and material in another which is comparable. We are of the view that the rationale upon which the distinction has been held to rest is untenable for the reasons hereinafter discussed.

The Maryland Air National Guard, although federally recognized, was an independent military force of the State

³ It was held that members of the National Guard of the District of Columbia were federal employees.

⁴ But see dissenting opinion of Chief Judge Lumbard.

under the command jurisdiction of the Governor as "Commander-in-Chief of the land and naval forces of the State." *Maryland Constitution, Article I, § 8, Maryland Code, supra, § 6.* The Governor was empowered to make such rules and regulations as were necessary to the appropriate "organization, discipline, training and equipment" of the Guard in conformity with "the National Defense Act,⁵ the amendments thereto,⁶ and regulations made in pursuance [fol. 719] thereof." *Ibid.* The Air Guard was under the immediate command of an Adjutant General "appointed by the Governor by and with the advice and consent of the [State] Senate." *Maryland Code, supra §§ 6, 9 and 10; 32 U.S.C. § 314(a).* The Military Department of the State was under the control of a ranking line officer on "active duty status" who, as Quarter Master General, was responsible "for the care, preservation and safekeeping of all military property," including that allocated to the Air Guard by the federal government. *Maryland Code, supra, §§ 10 and 11.*

The federally owned jet trainer involved in the collision had been purchased for and allocated to the Maryland unit pursuant to § 702 of Title 32 U.S.C., the pertinent provisions of which read as follows:

"(a) Under such regulations as the President may prescribe, . . . the Secretary of the Air Force may buy . . . and, upon requisition of the governor of any State . . . issue to its . . . Air National Guard, . . . the supplies necessary to uniform, arm, and equip that . . . Air National Guard for field duty.

"(d) No property may be issued to the National Guard of a State . . . unless that jurisdiction makes provision, satisfactory to the Secretary concerned, for its protection and care."

While the plane remained the property of the United States, 32 U.S.C. § 710(a), it was committed to the possession and control of the Maryland Guard for its exclusive use.

⁵ Act of August 10, 1956, *supra*.

⁶ Act of September 2, 1958, *supra*.

The plane was loaned to the State of Maryland under statutory terms and conditions which were essentially contractual. The State was granted exclusive possession and control of the craft on condition that it assume full responsibility for its care and maintenance, in accordance with federally prescribed standards, and liability for any loss or damage occasioned by negligence. 32 U.S.C. § 710(c). These conditions were limited to those which were essential to insure the care and protection of property purchased with federal funds. The State could be relieved of its accountability only under the conditions prescribed by statute. 32 U.S.C. §§ 704, 710 and 711.

The employment of Captain McCoy as a maintenance technician was pursuant to the pertinent provisions of § 709(a) and (f) of Title 32 U.S.C., which read as follows:

"(a) . . . Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard . . .

"(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them."

These provisions vested in the Secretary of the Air Force the right to spend federal funds for the employment and "compensation of competent persons," and the authority to designate the person by whom they were to be employed. There was no other right or authority vested in the Secretary. The statute merely authorized compensation of state employed caretakers from federal funds, an authorization consistent with subsidization.

The person designated by the Secretary, pursuant to subdivision (f), supra, was the Adjutant General of the Maryland National Guard. He was authorized by appropriate regulation "to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of [the] regu-

lation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau." *Air National Guard Regulations* (ANGR 40-01). The enumerated functions were exercised by the Adjutant General as the duly appointed representative of the State of Maryland; he was responsible only to the [fol. 721] Governor. The right to employ maintenance technicians and other personnel and, as an incident thereto, supervise their work and the manner of its performance, was vested in the Adjutant General, as the representative of the State of Maryland. See *Harris v. Boreham*, 233 F. 2d 110 (3rd Cir. 1956).

The United States Court of Appeals for the District of Columbia Circuit concluded in the companion case, *United States v. State of Maryland*, supra, p. 1012, that Captain McCoy "in his civilian capacity as a caretaker of property of the United States" was an employee of the United States within "the terms of the Federal Tort Claims Act." The conclusion appears to be predicated on the same rationale as the earlier cases; in fact, the earlier cases are cited in support of it.

The Court stated, at page 1013:

"In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland . . . There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

We cannot agree with either the conclusion or the tenuous premise upon which it rests.

[fol. 722] We have here a classic situation, of which there are many examples,⁷ in which the Congress has undertaken the financial support of a state activity in the national interest, on condition that the activity conform to the congressional enactments and the regulations promulgated thereunder. The Congress, consistent with the limited power vested in it by Article I, § 8 of the Constitution, *supra*, has undertaken to subsidize the National Guard units of the respective states, on condition that they be organized, maintained, disciplined and equipped in accordance with federally prescribed standards.

It is evident that the only purposes of the pertinent statutes, and the regulations promulgated thereunder, were to insure the effective organization of the National Guard and to protect federal funds against unrestricted expenditure, both in the national interest. There is nothing in the legislation which would indicate that it was the intent of Congress to either interfere with the right of the states to organize the Guard or deprive the states of the right to employ, supervise and control such civilian personnel as were deemed essential to the support of the Guard. We are of the view that in their relationships to the United States there is no distinction between a federally recognized member of the Guard and a federally recognized maintenance technician employed in his civilian capacity. A member of the Guard may qualify for federal recognition and compensation from federal funds only if he meets the standards prescribed by federal regulation; a maintenance technician may qualify for employment and compensation from federal funds only if he likewise meets the standards prescribed by federal regulation.

⁷ The Federal Aid Highway Act of 1958, 23 U.S.C. 101, et seq., under which Congress authorized the expenditure of federal funds and the apportionment thereof among the several states which assumed responsibility for the construction of highways as part of an interstate system of roads; the Hill-Burton Act and the amendments thereto, 42 U.S.C. 291, et seq., which authorized the appropriation of federal funds and the apportionment thereof among the several states, for the construction of hospitals and similar facilities.

[fol. 723] We are of the opinion, and so hold, that at the time of the accident Captain McCoy, in his capacity as maintenance technician, was an employee of the State of Maryland subject to the supervision and control of the Base Detachment Commander, who was in turn under the supervision and control of the Adjutant General. Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act, *supra*.

SECOND QUESTION

However, even if we assume that Captain McCoy, in his civilian capacity, was an employee of the United States, there remains a further question for decision. Was he acting within the scope of his employment as a maintenance technician at the time of the accident? Otherwise stated, was the activity in which he was engaged related to his employment as a maintenance technician and in furtherance of an interest of his alleged employer? The question must be decided under the law of Maryland, the place of the tortious conduct. 28 U.S.C. § 1346(b); *Richards v. United States*, 369 U.S. 1 (1962); *Pattino v. United States*, *supra*. The ultimate test is the relation or nonrelation of the tortious conduct to his work as a civilian employee. If Captain McCoy's activity at the time of the accident was within his line of duty as a member of the Guard, the United States cannot be held liable under the Federal Tort Claims Act. See the cases hereinabove cited.

It is the law of Maryland that an employer may be held liable in damages for personal injury or death caused by the tortious conduct of his employee only if, at the time of the accident, the employee was engaged in an activity in connection with the purposes of his employment and in furtherance of objects within his line of duty. *Lewis v. Accelerated Transport-Pony Express, Inc.*, 148 A. 2d 783 (1959); *Globe Indemnity Company v. Victill Corporation*, 119 A. 2d 423, 427 (1956); *Eyerly v. Baker*, 178 A. 691, 696 (1935). The decisive test of the employer-employee relationship, essential to the creation of liability, is the right of the employer to direct and control the employee at the time and in respect to the very occurrence out of

which the accident arose. *Greer Lines Company v. Roberts*, 139 A. 2d 235, 239 (1958); *Gallaghers Estate v. Battle*, 122 A. 2d 93, 98 (1956); *Henkelmann v. Metropolitan Life Ins. Co.*, 26 A. 2d 418, 423 (1942). The test is particularly applicable in the instant case.

In his military capacity Captain McCoy was a rated aeronautical officer assigned to the 104th Fighter-Interceptor Squadron of the Maryland Air National Guard. He was a qualified aviator and, as such, was permitted to fly federally owned aircraft when authorized to do so by the Base Detachment Commander. To maintain his level of efficiency and, incidentally, to retain his flying status, Captain McCoy was required by regulation to participate in the prescribed training programs and, in connection therewith, spend a minimum number of hours per year in aerial flight.⁸

These flights were designated as "proficiency flights," as distinguished from "functional check flights" which as the term indicates, had a different purpose. The proficiency flights had for their prime purpose training to improve flying skills. The training programs were under the control, supervision and command jurisdiction of the officers of the Maryland Air National Guard, subject only to the requirement that the programs conform to the standards prescribed by the Air National Guard Bureau. 32 U.S.C. § 501; *Air National Guard Regulation No. 50-01*.

In his military capacity Captain McCoy also held the position of "aircraft squadron maintenance officer." The duties and responsibilities of this post were somewhat similar to those of the maintenance technician. They were carried out under the command jurisdiction of Colonel [fol. 725] Kilkowski, as squadron commander, a military post. Captain McCoy testified, as did Colonel Kilkowski, that on every flight the "squadron maintenance officer" would evaluate the performance of the aircraft and report

⁸ The regulations fixed the minimum and maximum number of flight hours. When the maximum number of hours had been accumulated, a flying officer was no longer eligible for flight pay. Captain McCoy was in this situation at the time of the accident. However, the accumulation of additional hours was relevant to the officer's rating.

thereon to the appropriate officer. This was admittedly normal procedure even though the flight was one for the "purpose of maintaining flying proficiency."

The accident occurred on Tuesday, May 20, 1958, a day on which Captain McCoy was employed in his civilian capacity. He reported for work at the usual hour and, before taking off on the fateful flight, performed certain administrative duties related to his civilian employment.⁹ However, pursuant to arrangements previously made, Colonel Kilkowski authorized Captain McCoy to make a "proficiency flight." The written Flight Order specifically designated the flight as one "for purpose of maintaining flying proficiency." Captain McCoy also had permission to carry a passenger, a member of the Army Reserve who was interested in joining the Air Guard. It appears from the undisputed testimony that the flight was not a "functional check flight," which is one made in connection with aircraft maintenance, and requires a minimum crew of two qualified men.

At the time of the accident Captain McCoy was engaged in a training flight which was under the control and supervision of the authorized military personnel of the Maryland Air National Guard. He was not acting within the scope of his employment as a maintenance technician but was acting within his line of duty as a commissioned aeronautical officer of the Guard. The fact that he was not eligible for flight pay and was retained in the civilian payroll status is of no relevance.¹⁰ It is similarly of no relevance that in accordance with normal flight procedure he checked [fol. 726] the performance of the aircraft and reported thereon. This was his responsibility as "squadron maintenance officer," a military post.

⁹ On the day in question, Captain McCoy was carried in civilian pay status. He had accumulated the maximum hours of flight time for the period and could not qualify for flight pay.

¹⁰ The accumulation of the maximum number of flight hours was not a bar to additional proficiency flights; in fact, it appears from the testimony that the number of hours spent in aerial flight was a factor in the evaluation of a pilot's proficiency and, consequently, his rating.

After the accident Captain McCoy, having sustained injury, filed a written notice of claim for the benefits allowable under the Federal Employees' Compensation Act, 5 U.S.C. § 751. This claim was supported by the certificate of Lt. Col. Ebaugh, United States Property Fiscal Officer for the State of Maryland. The certificate stated that Captain McCoy was working "as a Civil Employee of the United States at the time of injury and not as a member of the Maryland National Guard." The claim was approved by the Department of Labor and the benefits allowable under the Act were paid. Whether the claim was properly or improperly approved we need not decide.

The appellees here argue that the certification, coupled with the subsequent approval of the claim for payment, was tantamount to a binding admission that Captain McCoy was a civil employee of the United States at the time of the accident. The argument is untenable for two reasons. An admission such as that made by Lt. Col. Ebaugh, unlike a judicial admission, is in no sense final and conclusive so as to bind the party on whose behalf it was purportedly made. *C. H. Elle Construction Co. v. Western Casualty & Sur. Co.*, 294 F. 2d 459, 461, 462 (9th Cir. 1961); *State Farm Mut. Auto Ins. v. Porter*, 186 F. 2d 834, 842 and 843 (9th Cir. 1950). The acceptance of the claim for compensation, supported as it was by Lt. Col. Ebaugh's statement, is of no significance. The doctrines of res judicata and equitable estoppel do not ordinarily apply to administrative determinations. *Jason v. Summerfield*, 214 F. 2d 273 (D.C. Cir. 1954), cert. den. 384 U.S. 840; *Niagara Mohawk Power Corp. v. Federal Power Commission*, 202 F. 2d 190 (D.C. Cir. 1952), affd. 347 U.S. 239. This is particularly true where, as here, the administrative determination is subject to review at any time by the agency which made it. 5 U.S.C. §§ 787 and 788.

[fol. 727] The judgments of the court below will be reversed and the actions remanded with directions that judgments be entered in favor of the defendant.

HASTIE, *Circuit Judge, concurring in result.*

I agree with Judge Smith that the flight during which this accident occurred was not an undertaking of a civilian caretaker in performance of his responsibility for aircraft maintenance. Rather, it was a "proficiency flight", a training activity, properly undertaken by Captain McCoy in his capacity as an officer of the Maryland Air National Guard.

The fact that any incidental observations this pilot might make concerning the performance of his plane would be communicated to and used by civilian technicians in the servicing or maintenance of the plane did not change the basic character of this training flight. Neither, as I see it, did it matter that the officer flying the plane had a second military responsibility as "squadron aircraft maintenance officer" and a separate and distinct civilian job at the airfield as a caretaker and aircraft technician. We all agree that in his capacity as a National Guard officer, whether functioning as a pilot or as the squadron aircraft maintenance officer, Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act. I think it is irrelevant that as a civilian caretaker and mechanic he might put to use the information he had acquired during the performance of one or both of his other responsibilities as a National Guard officer.

The considerations and conclusions stated in the foregoing paragraph are a sufficient basis for reversing the judgment of the district court and requiring the dismissal of this action. Therefore, I do not reach the more difficult and far-reaching question, whether a civilian caretaker and technician, employed as provided in section 709 of Title 32, United States Code, is a federal employee within the meaning of the Tort Claims Act.

[fol. 728] I join in the decision reversing the judgment of the district court, but without expressing any opinion upon that portion of the disagreement between my colleagues which concerns the status of civilian aircraft maintenance workers employed to care for federally owned planes while in the custody of National Guard units.

STALEY, *Circuit Judge, dissenting.*

In my judgment the decision of the majority is erroneous for the reason that it is premised on the resolution of a question which is not germane to the issue in this case. The majority reasons that constitutional and historical considerations make it manifest that, for the purposes of the Federal Tort Claims Act, members of the Air National Guard are state and not Federal employees. Until today that question had been left open in this Circuit. *O'Toole v. United States*, 206 F.2d 912 (C.A.3, 1953). In the Second Circuit, see *Courtney v. United States*, 230 F.2d 112 (C.A.2, 1956). In my view, the United States maintains such control over members of the National Guard even while they have not been called into active service that they are "employees of the Government" within the meaning of the Federal Tort Claims Act. But I leave that question to another day, for, as the majority states, "The first and most important question for decision is whether the relationship between the United States and Captain McCoy, in his civilian position as an air technician, was that of employer and employee within the meaning of the statute." (Emphasis supplied.) On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U.S.C. §709(a), "to care for material, [fol. 729] armament, and equipment of the Air National Guard * * * " which is property of the Federal Government.

On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an "employee of the Government" within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion.

The undisputed evidence in this case makes it abundantly clear that in addition to his duties as a member of the Air National Guard, Captain McCoy was employed as a civilian maintenance technician pursuant to 32 U.S.C.

§ 709. Indeed, the record shows that the major portion of his salary resulted from his employment in this capacity, and that he was so employed on the very day of this tragic accident. Pursuant to § 709(f), his salary was fixed by the Secretary of the Air Force, who had designated the Adjutant General of the Maryland National Guard to employ him. Thus, in this capacity, McCoy was employed under Federal law, received his pay from Federal funds, cared for Federal property, and his duties were fixed by Federal regulation. As the Court of Appeals for the District of Columbia has held with respect to this very individual in companion suits brought by the survivors of others killed in this catastrophe, "In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States," *United States v. State of Maryland, for the Use of Meyer*, 322 F.2d 1009, 1013 (C.A.D.C.), cert. denied, U.S. (1963). For an excellent exposition of these and additional factors which compel the conclusion that a caretaker is an employee of the Federal Government, see *Elmo v. United States*, 197 F.2d 230 (C.A.5, 1952), and *United States v. Holly*, 192 F.2d 221 (C.A.10, 1951). We specifically approved the rationale of *Holly* in *O'Toole v. United States*, 206 F.2d at 916. Thus, the effect of the majority's decision is to overrule our decision in that case.

The majority finds it difficult to perceive how the incidents of employment I have mentioned are material in considering McCoy's employment status as a civilian caretaker, but are not decisive in determining his employment status as a member of the National Guard. I have no such difficulty. There can be no question but that these indicia of employment represent significant, if not conclusive factors, in determining the employer-employee relationship. See *National Labor Relations Board v. Howard Johnson Co.*, 317 F.2d 1 (C.A.3, 1963), cert. denied — U.S. — (196). Hence, in ordinary circumstances, members of the National Guard would be considered Federal employees because substantial elements of control over them are vested in the United States. However, because of the constitutional provision with respect to the militia, several cases have held that members of the National Guard who have not been

called into active service are state and not Federal employees. See the cases cited in the majority opinion. I have already indicated my disagreement with that conclusion. But, in any event, there is no such constitutional or statutory provision with respect to civilian caretakers. Accordingly, in determining their employment status an analysis of the incidents of employment is of critical significance. As has been previously indicated, such an analysis of McCoy's status as a civilian caretaker of Federal property leads to the ineluctable conclusion that, in this capacity, he was an employee of the United States.

The majority states that as a full time maintenance technician McCoy was "employed by the Adjutant General of the Maryland National Guard." But this observation is not persuasive, for under 32 U.S.C. § 709(f), "the Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them." [fol. 731] Thus in employing McCoy the Adjutant General was merely acting as the designee of the Secretary of the Air Force. As was stated in *United States v. State of Maryland, for the Use of Meyer*, 322 F.2d at 1013:

" * * * The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

In this setting, to hold that McCoy was a state and not a Federal employee for the purposes of the Federal Tort

Claims Act is to thwart the remedial purposes for which that statute was enacted.

The majority also concludes that, assuming that Captain McCoy in his civilian capacity was an employee of the United States, he was not acting within the scope of his employment as a maintenance technician at the time of the accident. The plain answer to this conclusion is, as the Government concedes in its brief, that it is contradicted by the undisputed testimony of both Captain McCoy and his commanding officer. The testimony of the commanding officer who gave permission for the flight in question was given at the trial of the companion case in the District of Columbia. That testimony was made a part of the record in this case by the agreement [fol. 732] of the parties.¹ As indicated in the opinion of the Court of Appeals for the District of Columbia, the commanding officer testified as follows:

"A. The general reason for any flight of this nature is proficiency. You don't set up a flight for the express purpose of taking any individual up, the express purpose for flying is for your own general proficiency. If there is a seat available and the man qualifies in accordance with the regulations, it is permissible to take him up on that flight. The Air Force does it all the time.

"Q. Were there other reasons for the flight in question?

"A. I think as I mentioned before, a third person for any flight is to insure that the equipment is in

¹ In that portion of its brief describing the proceedings in the district court, the Government relates that:

"The evidence at the trial on that issue consisted of the testimony of Captain McCoy, and his commanding officer, Lt. Col. Kilkowski, and others, and numerous exhibits and depositions, including the deposition of Major General Winston P. Wilson of the Arkansas Air National Guard, who has been on active (Federal) duty in the National Guard Bureau of the Department of Defense as the Assistant Chief for the Air National Guard. Both Captain McCoy and Lt. Col. Kilkowski testified that in their opinions they believed that Captain McCoy was performing duties in his civilian capacity as well as his military capacity, at the time of the accident."

proper working order, to—well, as a result of each flight the maintenance officer takes, he has to fill out a form, whether the aircraft was okay, or whether it had even minor discrepancies which would be listed in the form. When he lands and comes back from the flight, this is done; so there is a third reason for the flight, which is to insure the proper maintenance of the equipment which he has general supervision over.

“Q. As an aircraft technician?”

“A. As an aircraft maintenance officer in the squadron and also as an air technician.”

United States v. State of Maryland for the Use of Meyer, 322 F.2d at 1012.

[fol. 733] The testimony of Captain McCoy is to the same effect. Certainly, in the light of this uncontroverted evidence, I cannot say that the district court erred in concluding that Captain McCoy was acting within the scope of his employment as a maintenance technician at the time of this accident.

I think that no more need be said; I would affirm the judgments of the district court.

[fol. 734]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 14,041

STATE OF MARYLAND for the use of NADINE Y. LEVIN, individually, and as next friend, mother and guardian of and for the use of JOY ELLEN LEVIN, an infant under the age of 14 years; and MELLON NATIONAL BANK AND TRUST COMPANY as Executor of the Estate of JACK LEVIN, deceased,

vs.

UNITED STATES OF AMERICA, Appellant.

(D. C. Civil Action No. 17503)

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Staley, Hastie and Smith, *Circuit Judges*.

JUDGMENT—April 1, 1964.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment, filed December 20, 1961 and entered December 21, 1961, of the said District Court be, and the same is hereby reversed, with costs, and the action remanded with directions that judgment be entered in favor of the defendant.

[fol. 735]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,042

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, and
KENNEDY SMITH as Executor of the Estate of RUTH M.
SMITH, deceased,

vs.

UNITED STATES OF AMERICA, Appellant.

(D. C. Civil Action No. 17541)

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Staley, Hastie and Smith, *Circuit Judges.*

JUDGMENT—April 1, 1964

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment, filed December 20, 1961 and entered December 21, 1961, of the said District Court be, and the same is hereby reversed, with costs, and the action remanded with directions that judgment be entered in favor of the defendant.

[fol. 736]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14,041 and 14,042

STATE OF MARYLAND for the use of NADINE Y. LEVIN, et al.,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, et al.,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

Present: Biggs, *Chief Judge*, McLaughlin, Kalodner,
Staley, Hastie, Ganey and Smith, *Circuit Judges*.

ORDER DENYING PETITION FOR REHEARING—April 28, 1964

The petition for rehearing filed by State of Maryland for the use of Nadine Y. Levin, et al., Plaintiff-Appellees, and State of Maryland for the use of Sydney L. Johns, et al., Plaintiff-Appellees, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Staley would grant rehearing.

By the Court, William F. Smith, Judge.

[fol. 737] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 738]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1964

STATE OF MARYLAND, for the use of NADINE Y. LEVIN, et al.,
Petitioners,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—June 23, 1964

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25, 1964.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

[fol. 739]

SUPREME COURT OF THE UNITED STATES

No. 345, October Term, 1964

MARYLAND for the use of NADINE Y. LEVIN,
SYDNEY L. JOHNS, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 19, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.